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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 460

HAROLD S. ANDERSON, JR. and ALFRED E. OHL, individually and as copartners, doing business as H. S. ANDERSON COMPANY,

Petitioners,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Harold S. Anderson, Jr. and Alfred E. Ohl, individually and as copartners, doing business as H. S. Anderson Company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which reversed a judgment in favor of Petitioners rendered by the United States District Court for the Southern District of California, Central Division.

Opinions Below.

The Findings of Fact, Conclusions of Law [R. 52-74; Appx. 4] and Judgment of the District Court [R. 75-76; Appx. 24] are not officially reported. The oral opinion of the District Court [R. 162-165; Appx. 1] is not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 178-184; Appx. 26] and the dissenting opinion [R. 185-190; Appx. 34] have not yet appeared in the official reports. A timely petition for rehearing was denied by that Court [R. 196-197; Appx. 37].

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered on August 25, 1955 [R. 191; Appx. 36]. The order denying the petition for rehearing is dated and was entered on July 30, 1956.

Questions Presented for Review.

First Question.

Whether or not the employees of a business providing food and lodging facilities principally for employees of an industrial establishment but also open to the public, are engaged in a *closely related process or occupation directly essential* to the production of goods for commerce so that their activities are covered by the Fair Labor Standards Act, as amended.

Second Question.

Whether or not, assuming the activities of such employees are covered by said Act, the business of providing food and lodging facilities principally for employees of an industrial establishment but also open to the public, is exempt as a *retail or service establishment* within the meaning of Section 13(a)(2) of the Act.

Third Question.

Whether or not, assuming the activities of such employees are covered by the Act, employees of a business providing food and lodging facilities principally for employees of an industrial establishment but also open to the public, are exempt as *employed in a local retailing capacity* within the meaning of Section 13(a)(1) of the Act.

Statutory Provisions Involved.

Pertinent provisions of the Fair Labor Standards Act of 1938, Chapter 676, 52 Stat. 1060, as amended, Chapter 736, 63 Stat. 910 (29 U. S. C. Section 201, *et seq.*) are as follows:

Section 3(j):

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

Section 13(a)(1) and (2):

> "The provisions of sections 6 and 7 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

Statement of the Case.

Respondent invoked Federal jurisdiction in the first instance under Section 17 of the Fair Labor Standards Act, as amended (29 U. S. C., Sec. 217).

The facts are established principally by stipulation [R. 14-50]. Additional facts not included in the stipulation were established at the trial by evidence which is uncontradicted in any material respect. The Findings of Fact appear at pages 52 to 74 of the Record (Appx. 4-22).

Petitioners are copartners in a concern doing business as H. S. Anderson Co. Petitioners as independent contractors provide dining and lodging facilities principally, but not exclusively, for industrial establishments at three locations in California. One of such facilities is located near Darwin, California, and provides services to some 225 employees of the Anaconda Copper Mining Company (hereinafter referred to as Anaconda). Such employees are employed in the milling and mining operations of Anaconda. Petitioners operate in accordance with the terms of a contract with Anaconda [R. 38; Stip. Ex. B].

Approximately eleven persons are regularly employed by Petitioners at the Anaconda operation. These employees consist of a manager, a chef, commissary clerk, second cook, dishwasher, waiters, combination men and janitors. In addition to making dining, lodging and commissary service available to employees of Anaconda, Petitioners' facilities are open to the public and are on occasion utilized by other than Anaconda employees [R. 53].

Petitioners' facilities consist of a dining room, kitchen, a commissary where beer, soft drinks, tobacco, toilet and similar articles are sold, and a lodging facility consisting of a lobby and single and double rooms [R. 53-54].

Some 20 to 25% of the employees of Anaconda regularly utilize Petitioners' facilities. The other employees of Anaconda obtain their meals and live elsewhere. Some 29 Anaconda employees (about 50% of the number who utilize Petitioners' facilities) live in the neighboring communities; of these 7 live in the town of Darwin, about a mile from Anaconda, 10 live in Keeler, approximately 22 miles away, 10 live in Lone Pine, located 37 miles away, and 2 others live at intermediate points [R. 55-56]. These employees commute daily over paved, two lane highways open all year.

School children of Anaconda employees and others in the area daily attend school in Lone Pine commuting by bus.

The principal mode of passenger transportation is by automobile. Some 50% of the employees who utilize Petitioners' facilities own automobiles and the remaining employees ride with them when there is need or occasion for transportation.

The town of Lone Pine is located on U. S. Highway 395. It has a population of approximately 1,415 and contains a number of restaurants, motels, a hotel, boarding houses, and rooming houses available to the general public [R. 62-63; Stip. Exs. R-W]. Other surrounding communities with lesser facilities are Darwin, Olancha, Keeler and Panamint Springs [R. 59-63; Stip. Exs. E-V].

Employees of Anaconda are not confined to Anaconda property or required by Anaconda to eat or lodge at any particular place [R. 64].

Petitioners' facilities are not remote and isolated to such an extent that they are removed from ordinary business competition [R. 69].

Petitioners' facilities are maintained as a convenience only. In the event that the sales and services provided by Petitioners at their Darwin operation should be curtailed or abandoned entirely, there would be only a temporary inconvenience to the operation of the mine. There would be no significant or substantial effect upon production or shipments of Anaconda. In the event such activities were curtailed or abandoned, employees who might leave as a result could be replaced normally within a relatively short time [R. 69].

Additional facts concerning the issues raised by Sections 13(a)(1) and (2) of the Act, which are also either stipulated or established by uncontradicted evidence, are as follows:

All of Petitioners' annual gross income from the Darwin operation results from the furnishing of goods and services within the State of California [R. 29, 73].

All of the meals served, goods sold, and lodging furnished by Petitioners are to persons who consume such meals or goods or utilize such services in the Anaconda area and in the State of California. All of such sales and services are to ultimate consumers and none is for resale. Over 75% of the total annual dollar volume results from the dining and commissary operations alone [R. 29, 73, 64-65].

The sales and services provided by Petitioners' Darwin operation are recognized and known as retail sales or services in the restaurant industry:

(1) The United States Bureau of Census classifies Petitioners' business as a retail trade [R. 152-153; Def. App. Ex. F].

(2) The United States Office of Price Administration, during the period of its existence, classified Petitioners' business as part of the restaurant industry [R. 153-154; Def. App. Ex. G].

(3) Petitioners' business is a part of the restaurant industry [R. 148-154; Def. App. Exs. A-E]. The term "retail sales or services" has a recognized meaning in the industry; namely, the sale or service of a meal to the consumer, generally consumed on the premises of the establishment. Petitioners sales and services are included within this definition and are recognized and known as retail sales or services in and by the restaurant industry [R. 156].

Each of Petitioners' employees is customarily and regularly engaged during all of his working time in making retail sales of goods or services of which 100% of the dollar volume is made within the State of California, his place of employment. Such duties consist of dishwashing, cooking, waiting, and cleaning. The duties of Petitioners' employees are described by stipulation on pages 66 to 68 of the Record.

ARGUMENT.

Preliminary Statement.

The issues involved in this case present important questions as to the scope of coverage of the Fair Labor Standards Act and as to the extent of the exemptions provided by the Act.

Numerous other companies throughout the United States operate dining and lodging facilities similar in service and function to those provided by Petitioners. The importance of the questions presented is shown by the fact that the number of industrial food establishments in the United States exceeds 26,000.*

The questions presented here thus affect an entire industry—the industry which provides dining and lodging services principally for persons employed in industrial establishments.

This Court, in many cases, has recognized that determination of the extent of coverage and the scope of the exemptions under the Fair Labor Standards Act is of such importance as to warrant the matter finally being resolved by this Court.** This is particularly true where

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*"America Eats Out" (1955), published by the National Restaurant Association, page 3. See also Def. Ex. G.

**We granted certiorari, believing that the proper administration of the Fair Labor Standards Act requires a resolution of the questions presented."

Maneja v. Waialua Agri. Co. (1955), 349 U. S. 254, 258-259.

"As of the extent of the coverage by reason of the phrase 'engaged in commerce' is important in the administration of the Fair Labor Standards Act, we granted certiorari."

McLeod v. Threlkeld (1943), 319 U. S. 491, 492.

"Despite the concurrence of views of the two Circuit Courts of Appeals, we brought the cases here because of the important questions presented as to the scope of the Fair Labor Standards Act."

Kirschbaum Co. v. Walling, 316 U. S. 517, 520.

not just one company but an entire industry is affected by the determination. The proper administration of the Act requires that this Court resolve these questions. Respondent himself in the trial court pointed out that the instant action was necessary in order to determine the extent of coverage of the Act [R. 168].

Judge Carter of the Federal District Court, the trial judge, determined that the activities of Petitioners' employees were not covered by the Act and that in any case Petitioners' business was a retail or service establishment [R. 162; Appx. 1].

Judge Fee of the United States Court of Appeals for the Ninth Circuit would have affirmed [see dissent, R. 185; Appx. 34].

But a majority of the Court below determined that Petitioners' employees were covered by the Act and that this conclusion was inconsistent with the concept of a retail establishment. The majority consisted of Judge Stephens and Federal District Court Judge Wiig, sitting *pro tem.*

The majority opinion of the Court below, we earnestly urge, is directly contrary to the decisions and pronouncements of this Court, contrary to the decisions of the Tenth and Sixth Circuits and of various District Courts, and contrary to the provisions of the Act and congressional intent as shown by unusually clear legislative history. As pointed out by the dissenting opinion, statements of fact basic to the decision are directly contrary to the Findings of Fact which are based entirely upon stipulation and uncontradicted, unchallenged evidence. The applicability of the Section 13(a)(1) exemption was not considered at all.

We do not believe it to be an exaggeration to state, and the following points will demonstrate, that the error in the application of the Act by the Court below is strikingly manifest and distinct. The importance of the questions presented and the number of employees and establishments affected requires the consideration and determination of this Court.

I.

The Decision Below Is in Conflict With the Decisions and Pronouncements of This Court.

This Court recently has had occasion to consider whether the employees of a large farming enterprise who were engaged in maintaining lodging facilities provided by the enterprise for its employees, were covered by the Fair Labor Standards Act. The case, directly in point, was decided subsequent to the principal decision in the instant case but prior to the order denying rehearing. That decision is *Mancja v. Waialua Agric. Co.* (1955), 349 U. S. 254, which involved questions as to whether various groups of employees of the enterprise were covered by Section 3(j) of the Act. One of these groups of employees performed the same type of work as that performed by the employees of Petitioners.

The enterprise provided housing facilities "where the great majority of its employees live." Such housing was made available to the employees of the enterprise because lodging facilities elsewhere were inadequate (349 U. S. at 257-258). The issue was whether the activities of the employees who maintained such lodging facilities were closely related or directly essential to the production of goods for commerce. This Court determined that *they were not covered.* The Court stated:

> "Under the 1949 Amendments to the Act, the work of the employees in maintaining the town

> clearly is not covered. 63 Stat. 911, 29 USC §203(j). The question presented in this case, therefore, is of small import in itself. Even so, to come within the coverage of the Act prior to this amendment, the activity of such employees must have a 'close and immediate tie with the process or production.' *Kirschbaum Co. v. Walling,* 316 U. S. 517, 525, 86 L. Ed. 1638, 1648, 62 S. Ct. 1116. *We do not believe such a tenuous relation as here established is sufficient"* (349 U. S. at 271).*

The conflict between the *Maneja* case and the instant case is more pronounced when it is considered that:

1. The employees were employed directly by the producer in commerce rather than by an independent contractor as here.

2. The "great majority" of employees in the *Maneja* case utilized the housing facilities; in the instant case, only 20-25% do so.

The majority opinion below stated the principle which controlled its decision as follows:

> "It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper."

This, of course is directly contrary to the decision in the *Maneja* case. In the *Maneja* case it is stated that lodging facilities were inadequate for employees of the enterprise.

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*Emphasis ours throughout unless otherwise indicated.

As a result the enterprise acted to furnish them and itself employed the persons involved to maintain such facilities. Nevertheless this Court held that such employees were *not* covered by the Act.

The majority opinion of the Court below holds in substantially the same fact situation that the employees are covered by the Act. We submit that this is a direct conflict which cannot be reconciled.

This Court has also decided a case involving a similiar fact situation even prior to the 1949 amendments. In *McLeod v. Threlkeld* (1943), 319 U. S. 491, the employees involved were engaged by an employer to prepare and serve meals to maintenance-of-way employees of a railroad. The employer was a partnership with a contract to furnish meals to the railroad employees. The meals were served in a railroad kitchen and dining car attached to a particular gang of workmen and located on the tracks of an interstate carrier. The car was set conveniently to the place of work of the boarders and in emergencies followed the gang to the scene of its activities. The employees paid the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due, and to pay it to the contractor. Because of the very nature of the work the employees would have to utilize the facilities since on many if not most occasions no others would be available in the desolate areas where this type of work had to be done.

The issue was whether such employees were engaged in commerce within the meaning of Section 3(j).

In holding that such employees were not covered by the Act, this Court stated:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."
>
> *McLeod v. Threlkeld,* 319 U. S. 491, 497.

The test in the *McLeod* case was whether such employees were "engaged in commerce." We believe, however, that the foregoing statement as to the nature and effect of this type of operation makes this an immaterial distinction within the meaning of the Act.

The furnishing of food and lodging would be as essential for the continuance of the labor of a man enaged in commerce as for one engaged in the production of goods for commerce. This Court has held that the furnishing of food is "remote from commerce." If it were remote from commerce, it must be equally remote for the production of goods for commerce. There can be no logical distinction upon this basis.

This conclusion was reached in *Kuhn v. Canteen Food Service* (N. D. Ill., 1944), 77 F. Supp. 585, involving a very similar factual situation.

II.

The Decision Below Is in Conflict With Decisions of the Tenth and Sixth Circuits and Various Federal District Courts.

The United States Court of Appeals for the Tenth Circuit has decided the same basic issue contrary to the decision below. A review of the facts and the opinion shows a clear conflict which only this Court can resolve.

In *Juarez v. Kennecott Copper Corp.* (10th Cir., 1955), 225 F. 2d 100 a mining company itself owned and operated a hospital located at the rim of an open pit mine in New Mexico. It was contended by plaintiff that the work of the employees of the hospital was so closely related and so essential to the production of goods for commerce as to place them within the coverage of the Act. The Court denied this contention and found that the Act *did not cover* such employees. The Court said:

> "The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce. Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these cases arose prior to the amendment of Section 203(j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods or *in any closely related process* or occupation directly essential to the production thereof, in any State.' We think it is clear from the legislative history that this amendment was to restrict coverage with respect to such employees. The conference report (H. R. Rep. No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949, W. H. M. 6:607) states, 'The courts have also held the act

applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the Act has also been extended to employees of an individually owned and operated restaurant located in a factory McComb v. Factory Stores Co., D. C. N. D. Ohio, 1948, 81 F. Supp. 403.

" 'Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc. activity than was true in the above-cited cases.' " (Emphasis by the Court).

Juarez v. Kennecott Copper Corp., 225 F. 2d at 102.

The factual situations are very similiar. In one case the employees maintained and operated a hospital at the rim of an open pit mine providing the usual services for employees of the Kennecott Copper Corporation among others. In the instant case the employees involved maintained and operated a food and lodging facility providing the usual services for employees of Anaconda, among others.

The only difference is between a hospital service and a food and lodging service—a distinction we submit is of no consequence. Indeed, the Tenth Circuit relied upon their similarity in reaching its decision.

The conflict with the *Juarez* case is even more direct when it is considered that there the employees were actually employees of the producer of goods for commerce. Here they are employees of an independent contractor who operates similiar facilities for other companies, not just for Anaconda.

The tests applied by the two circuits to determine extent of coverage of the Act are entirely different and opposed to each other. So are the results.

In the decision below the 1949 amendments and the legislative history with respect thereto are almost entirely ignored. The test applied is that established by the Ninth Circuit in 1942 under the old law and long before the 1949 amendments.* The Tenth Circuit decision on the other hand recognizes the clear statutory requirements and the directly applicable legislative history. The decisions are in direct conflict.

The decision below is also in conflict with that of the Sixth Circuit in *Factory Stores Co. v. McComb* (6th Cir., 1949), 179 F. 2d 238 (this case is discussed below under Point III). The factual situation is strikingly similar to that involved here. The District Court's decision in that case, handed down prior to the 1949 amendments, was the same in reasoning and result on both the coverage and retail and service exemption questions, as the majority opinion below. It found that the Act covered the employees involved because their activities were "integrated"

**Consolidated Timber Co. v. Womack* (9th Cir., 1942), 132 F. 2d 101, involved a cookhouse provided and operated by the producer in commerce at an isolated lodging camp. Access was impossible except by Company train or track speeder. The case was decided under the "necessary" test prior to the 1949 amendment to Section 3(j). The differences in the factual situation between that case and the instant case are apparent. Equally significant, however, is the fact that the Court below in the *Womack* case relied almost entirely upon the reasoning and conclusions in *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101, decided in 1919. That case arose under the Federal Employers Liability Act. But subsequent to the *Womack* decision and prior to the 1949 amendments to the Act, this Court specifically held that the *Smith* case "should not govern our conclusions under the Fair Labor Standards Act." *McLeod v. Threlkeld* (1943), 319 U. S. 491, 496.

with the production process. It found in effect that the facility was not a retail or service establishment because this would be inconsistent with the conclusion that it was integrated with the production process.

The case was appealed to the Sixth Circuit. While pending there it came under discussion in Congress in connection with the 1949 amendments. The case was frequently referred to by name in the legislative history. It was criticized and specifically reversed by Congress.

As a result, Respondent, Appellee in that case, moved to remand and Appellant there similarly moved. The Court, because of the passage of the 1949 amendments, remanded the case to the District Court.

While the Sixth Circuit did not specifically decide the merits of the case, it found in effect that the law applicable to this factual situation had been changed. The majority decision below, however, specifically determined that the 1949 amendments did not change the law applicable to this situation. Under its decision the remand of the Sixth Circuit would not have been made. The conflict between the two decisions is basic.

The decision below is also directly contrary to a number of Federal District Court decisions involving substantially the same factual situation.

See:

Kuhn v. Canteen Food Service (N. D. Ill., 1944), 77 F. Supp. 585;

Bayer v. Courtemanche (D. Conn., 1947), 76 F. Supp. 193;

Tipton v. Bearl Sprott Co. (S. D. Cal., 1950), 93 F. Supp. 496, 505, *vacated on other grounds,* 175 F. 2d 432.

See also:

Relander v. Mason County Logging Co. (Wash. Super. Ct., 1942), 2 W H Cases 1052.

We submit that the conflict between the Ninth Circuit and the Tenth and Sixth Circuits is direct and should be resolved by this Court.

III.

The Decision Below Is in Conflict With the Provisions of the Fair Labor Standards Act Itself, as Confirmed by Unusually Clear Legislative History.

The majority decision below holds that the activities of Petitioners' employees are covered by the Act in that such activities are part of a closely related process or occupation directly essential to the production of goods for commerce, within the meaning of Section 3(j). It also holds that Petitioners' business is not a retail or service establishment within the meaning of Section 13(a)(2).

Concerning the coverage of the Act, as amended, under Section 3(j):

Section 3(j) of the Act, as amended, states ". . . for the purpose of this Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any closely related process or occupation directly essential to the production thereof,* in any State."

Prior to the 1949 amendments to the Act, Section 3(j) established the test in this respect to be whether

the employees were engaged "in any process or occupation *necessary* to the production" of goods for commerce.*

The Wage and Hour Administrator, in interpreting the Act prior to its amendment, placed a very broad interpretation upon the word "necessary," in many cases construing it to mean little more than "convenient." The courts sometimes followed the views of the Administrator. Several cases were decided under the Act prior to its amendment in which "necessary" was thus broadly interpreted.**

In amending the Act in 1949, Congress severely criticized this result, among others, as being contrary to its intent in enacting Section 3(j). As a result, this section was amended to substitute for the word "necessary," much stronger words, namely, "closely related" and "directly essential."

The attitude of Congress is clearly revealed in the legislative history of the 1949 amendments. It is particularly clear with respect to the factual situation involved in this case. A review of this history concerning the amendment to Section 3(j), can leave little doubt that it was not the Congressional intent to extend coverage to the category of business involved here.

Such intent is shown by a detailed consideration of the circumstances and history of *McComb v. Factory Stores Co. of Cleveland* (N. D. Ohio, 1948), 81 F. Supp. 403.

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*52 Stat. 1061 (1938).

** *McComb v. Super-A Fertilizer Works* (1st Cir., 1948), 165 F. 2d 824;

E. C. Schroeder Co. v. Clifton (10th Cir., 1946), 153 F. 2d 385 *cert. den.* 328 U. S. 858;

Martino v. Michigan Window Cleaning Company (1946), 327 U. S. 173.

The facts in that case are very close to those in the instant case:

1. The issue was whether the Act covered persons employed by an industrial eating facility similar to that involved here; and if so whether such facility was a retail or service establishment.

2. Canteens providing eating facilities were located in the various plants of the Republic Steel Company. The canteens were maintained adjacent to the places of work so that the employees could "eat whenever they get an opportunity, so that it does not interfere with the performance of their duties" (81 F. Supp. at 405).

3. In the instant case the majority decision below placed considerable weight upon the fact that "Anaconda kept a strong guiding hand over Operator in the operation of the facility" [R. 179; Appx. 27]. But the contract between Factory Stores Co. and Republic Steel Company was in all substantial respects the same type of contract as that involved here (81 F. Supp. at 404).

4. Most, if not all of the employees utilized the Factory Stores' facilities; in the instant case only 20-25% of the Anaconda employees do so. (81 F. Supp. at 405.)

5. Frequent meetings were held between Republic and the Union with respect to the quantity and quality of meals, an item relied upon by Respondent here. Indeed Republic employees refused to work unless food was obtainable. (81 F. Supp. at 409.)

6. Company security regulations prohibited employees from leaving the plant. Quite apart from such rule, the facts were that

"outside restaurants because of the lack of transportation facilities are too remote to be patronized"

(81 F. Supp. at 409), and even if employees had the time they "would find it very difficult if not impossible with the available transportation facilities" to utilize outside restaurants. (81 F. Supp. at 405.)

The trial court's decision in *Factory Stores,* both on the coverage question and the retail service exemption question (discussed below), is substantially the same as the majority opinion below.

The case was appealed to the Sixth Circuit and was pending there when it came under discussion in Congress in connection with the 1949 amendments to the Act. The case was frequently referred to by name. The decision was criticized and specifically reversed by Congress.

The House Managers' Statement on the bill resulting from the Senate-House Conference and later enacted into law by signature of the President on October 26, 1949,* states in part as follows:

"Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N. D. Ohio, 1948)).

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited case. . . ."

* * * * * * * *

"The following are some examples of cases in which the Administrator and the courts will no longer

---

*House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949.

be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production: . . ."

* * * * * * * *

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

95 Cong. Rec. 14928, 14929.*

Mr. Lucas in his statement concerning his bill in the House which incorporated the adopted change in Section 3(j), said:

"Nor could the Administrator hold the act applicable as he has in the past to the following:

* * * * * * * *

"(e) Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the Factory—McComb v. Factory Stores Co. (81 F. Supp. 403)."

95 Cong. Rec. 11001.

The conflict of the majority opinion below with the provisions of the Act and with clearly expressed Con-

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*The House Managers' Report was the only report concerning the amendment considered by Congress prior to its enactment. Respondent has placed great weight upon what he calls the "Report of the Majority of Senate Conferees." However, this document was not a "report" at all nor was it part of the legislative history of the amendments. It was not before the Senate during the debates or before the amendments were passed. It represents the views of three senators only and not those of the Conferees or of the Senate. This was recognized by the Senators themselves and is abundantly clear from the record (95 Cong. Rec. 14870-2).

gressional intent to exclude from coverage the type of business involved here, we believe is obvious.

Concerning the application of the retail and service exemption provided by Section 13(a)(2) of the Act, as amended:

Similarly Congress in amending the Act in 1949 intended to redefine the retail and service exemption as it had been applied by the Administrator and the courts. Section 13(a)(2) was entirely rewritten.

The majority opinion below disposes of the retail and service establishment issue by stating merely that its conclusion on the coverage question was "inconsistent with any conclusion that [the facility] is a retail enterprise." [R. 183-184; Appx. 33.] This in substance was the same test applied in the *Factory Stores* case. It was the same test applied by the Court below in decisions prior to the 1949 amendments.*

A review of Section 13(a)(2), as amended, particularly in the light of its legislative history, can leave no doubt that such a test was not intended but rather was rejected by Congress. However such considerations as integration with the production process may be relevant to the coverage question, they are not relevant in determining the exemption questions. The amended Section 13 (a)(2) sets up specific requirements which alone measure the impact upon commerce:

(1) Whether more than 50% of the establishment's annual dollar volume of sales of goods or services is made in California.

Consolidated Timber Co. v. Womack (9th Cir., 1942), 132 F. 2d 101.

(2) Whether 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, is for resale.

(3) Whether 75% or more of the establishment's sales or services are recognized as retail sales or services in the particular industry.*

Congress clearly contemplated that the type of facility involved here constituted a retail and service establishment. Again, the text of the House Managers' Statement is very relevant in this respect. Again, the *Factory Stores* case is referred to by name.

> "Exemptions
>
> *"General statement.*—The House bill substantially revised Section 13 (a) (2) of the Act relating to retail and service establishments. . . .
>
> * * * * * * * *
>
> "The amendment (Sec. 13 (a) (2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* (E. D. Pa., 1949), 16 Labor Cases, par. 64,982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio, 1948)).
>
> "Under paragraph (2) of Section 13 (a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

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*Prior to its amendment Section 13(a)(2) provided:

"The provisions of Sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1067 (1938).

"First, over 50 per cent of the establishment's sales by annual dollar volume of goods or services must be made within the state in which the establishment is located. . . . Under the new test, if the sales are made within the state in which the establishment is located, *it is immaterial that the sales . . . (c) are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce.* . . .

* * * * * * * *

"The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. . . .

"The third test provides that 75 per cent of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. *Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service.* . . . Likewise, sales or service of hotels, restaurants, barber and beauty shops, repair garages, filling stations and the like, *whether made or rendered to private householders or to business customers,* will be retail so long as they are recognized as retail sales or services in such industries.

* * * * * * * *

"The location of the establishment, whether in an industrial plant, an office building, railroad depot, or a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will

be excluded from the minimum wage and overtime provisions of the Act."

House Managers' Statement (House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949).

To review the record concerning the applicability of Section 13(a)(2):

The first two criteria required by Section 13(a)(2) were established by stipulation and incorporated in the Findings of Fact [R. 73; Appx. 22].

It was therefore only necessary for the exemption to apply to establish the third requirement, namely, that 75% or more of the annual dollar volume of sales of goods or services were recognized as retail sales or services in the particular industry. This was established by substantial, uncontradicted evidence, indeed the only evidence which was available, as follows:

(a) The United States Bureau of Census in its Census of Business classifies Petitioners' business as retail [R. 152-153; Def. Ex. F].

(b) The United States Office of Price Administration during the period of its existence, classified Petitioners' business as part of the restaurant industry [R. 153-154; Def. Ex. G].

(c) Petitioners are part of the restaurant industry and participate in the activities of that industry. Their business is a retail activity by tradition and practice and within the definitions of the restaurant industry. Petitioners' sales and services are recognized and known as retail in and by the restaurant industry [R. 148-154; Def. Exs. A-E].

Respondent did not introduce a single item of evidence to rebut this proof. It is uncontradicted. Indeed, the

relevance of the evidence with respect to the U. S. Bureau of Census and the Office of Price Administration is conceded by Respondent. In other cases Respondent himself, in applying this test, has introduced and relied upon classifications by the U. S. Bureau of Census and other governmental agencies. (See *Mitchell v. T. F. Taylor Fertilizer Works* (5th Cir., 1956), 233 F. 2d 284 and *Boisseau v. Mitchell* (5th Cir., 1955), 218 F. 2d 734.)

The only possible conclusion upon the record and the law, we urge, is that Petitioners' facility constitutes a retail and service establishment within the meaning of Section 13(a)(2), as amended.

The majority decision below is, we believe, wholly in conflict with the Act and with the unmistakably clear intent of Congress both with respect to the coverage question and the retail and service exemption.

IV.

The Stated Factual Basis Upon Which the Decision Below Rests Is in Direct Conflict With Unchallenged Findings of Fact in Crucial Respects.

The majority opinion rests its opinion upon statements of fact which are basic to the decision but which are directly opposed to those found by the District Court upon stipulated and uncontradicted evidence.

For example, the opinion states:

> ". . . in each instance the facility furnished was without a question needed, and without it the production would have been affected." [R. 181, Appx. 30.]
>
> * * * * * * * *
>
> "Is it clear that the hiring of men and the continuity of service would not be made substantially difficult

if the facility should be abandoned?" [R. 183, Appx. 32.]

But the Findings of Fact specifically state that:

"In the event that the sales and services provided by defendants at their Darwin operation should be curtailed or abandoned entirely there would be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof." [Finding 19, R. 68-69, Appx. 18.]

". . . the presence or absence of defendant's type of facility would not be a deciding or important factor in the existence of a labor supply." [Finding 25, R. 73, Appx. 21.]

The Findings also establish, contrary to the majority opinion, that Petitioners' facilities are maintained as a convenience only; that mining and milling employees tend to prefer to live in communities even at considerable distances because of the increased desire for community living, improved roads and better transportation. Furthermore, the Findings establish that Petitioners' facilities are not remote or isolated to such an extent that they are removed from ordinary business competition. This is not the case of an isolated lumber camp. Other facilities are not only available, but are actually used by 75 to 80% of the employees of Anaconda [R. 52-74; Appx. 4].

The Findings were all supported by substantial evidence, stipulated and uncontradicted. They have not been seriously challenged.

Not only the tests applied by the Court below are in error, but so also are the factual statements on basic points upon which the decision rests.

V.

The Court Below Improperly Performed Its Function in That It Did Not Decide or Consider in Its Opinion Whether Petitioners' Employees Are Exempt Under Section 13(a)(1) of the Act.

Section 13(a)(1) exempts from the relevant sections of the Act any employee employed in a local retailing capacity. Although raised as an issue before the Court below and upon rehearing, the majority did not decide or consider in its opinion the application of this section.

Section 13(a)(1) provides:

> "The provisions of Sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, . . . (as such terms are defined and delimited by regulation of the Administrator): . . ."

The Administrator of the Act was given specific authority to establish the criteria for this exemption. He has done so as follows:

> "The term 'employee employed in a bona fide * * * local retailing capacity,' in Section 13(a)(1) of the Act, shall mean any employee:
>
> "(a) who customarily and regularly is engaged in:
>
> "(1) Making retail sales of goods or services of which more than 50 per cent of the dollar volume are made within the state where his place of employment is located, or
>
> "(2) Performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

"(b) whose hours of work of a nature other than that described in paragraphs (a)(1) or (2) of this section do not exceed 20 per cent of the hours worked in the workweek by nonexempt employees of the employer."

29 *C. F. R.* Chap. V, §541.4.

In view of the facts, most of which have been stipulated, and the uncontroverted evidence, it is quite clear that each of the employees of Petitioners are exempted according to the tests established by this section. These employees consist of cooks, waiters, dishwashers and clean-up men. They are engaged in the most traditional of retail activities. The duties of each is described in Stipulation of Facts [R. 27-29] and are incorporated in the Findings of Fact [R. 66, Appx. 16].

The nature of the employer's business under this exemption is not determinative. It is the activity of the employee that is controlling. The Administrator himself has recognized that this is the interpretation required by the specific language of the Act, as follows:

"the section 13(a)(1) local retailing capacity exemption depends on the capacity in which the particular employee is employed, and not on the character of the establishment in which or by which he is employed. It is not material, therefore, in determining the applicability of the section 13(a)(1) exemption to any particular employee, whether the establishment in which or by which he is employed is a retail or service establishment or a wholesale or a manufacturing establishment. Thus, for example, an employee of a wholesale or a manufacturing establishment who is employed in a local retailing capacity as that term is defined by the Administrator, may be exempt from the wage and hours provisions of

the Act even though the other employees of the establishment are nonexempt. * * *"

29 C. F. R. Ch. V, §779.28.

This important issue is separate and apart from the other issues in the case. In view of the decision on the other issues, this issue must be decided in order to properly dispose of this case. The Court below failed to do so and resort can only be had to this Court.

Conclusion.

We earnestly urge that there is a vital basis and cause for this Court to grant the Petition and hear this matter.

The issues involve the scope and limits of coverage of the Fair Labor Standards Act and of the exemptions provided by that Act. A substantial industry and its employees are involved. The decision below we believe to be manifestly in error by any appropriate standard. *It is in conflict with the decisions and pronouncements of this Court. It is in conflict with the decisions of the Tenth and Sixth Circuits.* It is in direct conflict with the Act particularly as shown by its legislative history. It is even in open conflict in its statement of crucial facts with the Findings of Fact, which are based upon stipulated and uncontradicted evidence. It failed to decide an important issue requiring decision.

Congress considered the type of activity involved here local in nature, to be subject to local, not Federal regulation.

Respectfully submitted,

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Of Counsel.

Dated: September 26, 1956.

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APPENDIX.

Oral Opinion of Judge James M. Carter, Judge of the United States District Court.

We are concerned with the meaning of Section 3(j) or 203(j), Title 29 of the United States Code, as to the meaning of the word "produced" and particularly the words "in any closely related process or occupation directly essential to the production there of, in any State." "Directly essential."

* * * * * * * * *

There is no doubt in my mind that a mining company in an isolated area could have in operation an establishment such as the Anderson operation, and that the employees of that operation would come within the Act. There is no doubt about that.

The example I gave the witness would be that kind of a case. It is a remote area, no means of transportation around, and no other property nearby where someone else could build a restaurant. The company contracts with an organization like the Anderson organization and they go in and serve meals. I think I would hold that within the Act.

The question I asked of the witness was merely to bring out the fact that what the Restaurant Association might think of a problem is not the answer to the problem, because I expected him to answer, not knowing then that he was a lawyer, that he would take that company into the organization. However, I discovered later on

he was an attorney, so he hedged on my questions a little bit.

I have given you one extreme. On the other hand, we have a different kind of situation here entirely. We have a mining operation within one mile of a small town, an ordinary town. There are some cafes nearby in that town and other towns, there are good roads from one place to another. So you get away from this picture of isolation, and you have a problem that I do not think comes within that rule.

Congress passed this law having in mind that this is a competitive society. We have free enterprise. They didn't say so in the statute, but they knew that. We assume they had that in mind. So what happens? If the Anderson commissary should close down, I haven't a doubt but what the people who operate restaurants in the town of Darwin would expand their facilities if there was trade coming into these other restaurants. If men came and wanted meals, I don't know of any merchant that would turn away business that comes to his door, and I haven't a doubt but what if the Anderson operation would close down, outside of some slight initial period of readjustment, that the needs of the workers in the industry could be well taken care of probably right in the town of Darwin, not even having to worry about these towns 14 to 38 miles away.

I think that this commissary, boarding house, was more essential to the mining operation when it first started

than it is now, and the longer the operation progresses there the less essential it will be. It is a convenience, a convenience particularly to the type of man who has no family or who is willing to leave his family and go in and take a job. But I can't find that its operation is essential to the production of goods. And, as I say, I distinguish it from an instance where there would not be the opportunity for a private industry to represent restaurants, rooming houses, sleeping rooms, and things of that sort.

* * * * * * * * *

I would hold, also, that it is a retail establishment within the exemption. I would base my decision upon both grounds. [R. 162-165.]

Findings of Fact and Conclusions of Law.

In the United States District Court for the Southern District of California, Central Division.

Martin P. Durkin, Secretary of Labor, United States Department of Labor, Plaintiff, vs. Harold S. Anderson, Jr., *et al.*, Defendants. Civil Action File No. 15079-C.

This cause having duly come on for trial on October 13, 1953, at 10:00 a.m. before the Honorable James M. Carter, judge presiding, George E. Duemler appearing as counsel for plaintiff, William French Smith of Gibson, Dunn & Crutcher appearing as counsel for defendants and the Court having heard and considered the evidence both oral and documentary offered by the respective parties and the matter having been submitted to the Court for decision, the Court being fully advised in the premises now makes its Findings of Fact as follows:

(1) Defendants Harold S. Anderson and Alfred F. Ohl are copartners in a concern doing business as H. S. Anderson Co. Defendants operate three establishments providing dining and lodging facilities in various localities in California, each under contract with a commercial company. The main office is in West Los Angeles, California. The employees involved in this case are employed by defendants at their establishment located on certain property owned by the Anaconda Copper Mining Company (hereinafter referred to as "Anaconda") near Darwin, Inyo County, California. The buildings and facilities used by the defendants in this operation are leased from Anaconda under the terms of the contract hereinafter referred to. Defendants operate in accordance with the terms of said contract as an independent contractor with management, operation and maintenance functions relative

to the provision of dining and lodging facilities being entirely performed by defendants. Approximately 11 employees of defendants are regularly employed by defendants at their Anaconda operation. The wages, hours and working conditions of employees of defendants are determined by defendants. Such employees are supervised, controlled and directed by defendants. These employees are engaged in furnishing dining, lodging and commissary service to employees of Anaconda, and occasionally and incidentally to other persons in the area and to the public as hereinafter described. Defendants' facilities consist of a dining room and kitchen, a commissary where beer, soft drinks, tobacco products, toilet and similar articles are sold, a lodging facility consisting of a lobby or community room, and single and double rooms. A true representation of these facilities showing the dining room and kitchen in the foreground, and the lodging facility in the background is attached to the Stipulation of Facts made part of the record in this case (hereinafter referred to as the "Stipulation") as Exhibit D. These facilities are contained in two separate buildings used exclusively for these purposes.

For the purposes of this litigation only, the employees of Anaconda at the Darwin Mine are engaged in the mining and milling of lead, silver and zinc ores, which ores are regularly shipped in interstate commerce.

(2) Prior to November 1, 1945, the facilities here involved which are now operated by defendants were operated by Anaconda. On that date an agreement was entered into between Anaconda and the defendants as successful bidders, which agreement provided for the operation of these facilities by the defendants. A copy of this agreement is attached to the Stipulation as Exhibit

A. Subsequently on October 1, 1946, a further agreement was entered into between the same parties, which agreement, with one amendment, is attached to the Stipulation as Exhibit B.

(3) Anaconda at the Darwin Mine on August 12, 1953, and theretofore, employed approximately 236 employees in the activities described in (1) above. The average number of employees during the last six months has been 222, consisting of approximately 126 employed in the mine, approximately 29 employed in the mill, approximately 33 employed as shop men, drivers, electricians and other surface men, and approximately 34 office, supervisory, et cetera, employees. Many of these employees rent homes owned by Anaconda on the Anaconda property, some rent trailers owned by Anaconda and some live in their own trailers located in the Anaconda trailer area, some other employees live in defendants' lodging facility and other employees reside in surrounding communities. Three-room houses are rented to employees by Anaconda for $18.50 per month, four-room houses rent for $25.00 per month, and those with extra rooms rent for $30.00 per month. Twelve units, called apartments, are furnished. Others are partially furnished and still others are unfurnished. Trailers rent for $20.00 per month furnished. Other than defendants' lodging facility there are 98 housing units on Anaconda property in the vicinity of the mine usually occupied by employees of Anaconda and their families. Of these, 81 are owned by Anaconda; 61 of these units are houses, and 20 are trailers. The remaining 17 are privately owned trailers.

Approximately seven of the employees of Anaconda live in the town of Darwin. Approximately 10 live in the town of Keeler which is 22 miles from the Anaconda

property and approximately 10 live in the town of Lone Pine which is 37 miles from the Anaconda property. Approximately two employees live near the Sierra Talc mine, which is located north of Highway 190 between the towns of Darwin and Keeler. These employees commute daily over highways between such communities and the Anaconda mines. Of these employees only five living in Keeler have requested and are currently waiting for housing facilities, other than defendants', on the Anaconda property.

During the month of July, 1953, approximately 64 male employees of Anaconda lived in the lodging facility operated by defendants, which facility has a capacity of approximately 75 exclusive of those employed by defendants. During the previous six-month period, an average of 62 of said employees, with a range of from 30 to 70, have resided in said facility. Of this 62 an average of approximately 7 or 8 upon arrangement with defendants and for their own reasons do not use the dining facility at all. Others from time to time for various reasons will not use such facilities. Approximately 51 were regularly fed by the defendants at their dining facility during the month of July, with an average of 49 of said employees being fed during the previous six-month period. The employees of defendants are principally engaged in providing dining and lodging facilities to the extent described herein. Men who do not reside at defendant's lodging facilities also occasionally are served at the dining room. Defendants serve meals at the dining room commencing at the hours of 6:30 a.m., 10:30 a.m., 11:30 a.m., and 5:00 p.m. On Sundays the hours are 8:30 a.m., 12:30 p.m. and 4:30 p.m. Meal times are adjusted principally to accommodate the needs of em-

ployees of Anaconda whose mine operates on a two-shift basis and whose mill operates on a three-shift basis, although on occasion meals are served at other times of the day.

(4) Pursuant to the subsistence agreement entered into on October 1, 1946, as amended, which is still in full force and effect, defendants furnished meals in the ten months preceding June 22, 1953, as described in Exhibit C attached to the Stipulation.

(5) Defendants do no highway advertising of their facilities at the Darwin mine. Newspaper advertising of the facilities in question is sometimes done by Anaconda in recruiting employees, as indicated in Exhibit AA attached to the Stipulation. Defendants' facilities are, however, open to be patronized by the public (guests and visitors and cash meals) to the extent shown in Exhibit C attached to the Stipulation. Those other than employees of Anaconda, who patronize defendants' dining room are generally salesmen, visitors and guests of Anaconda employees, members of historical or geological organizations which have interests in the area and other members of the general public who may be in the area for other purposes. During the last six months, an average of 168 meals per month were served by defendants to visitors and guests of employees and personnel of Anaconda. These meals are charged for at the rate of $1.50 per meal. In the case of mine employees, this is paid for by the employee or his guest or charged to the employee's account. In the case of non-mine personnel or guests, the personnel, guests, or in some cases Anaconda will pay for such meals. Lodging is limited to the male employees of Anaconda who are either single or whose families reside outside the Anaconda area.

(6) Common carrier service for freight but not for passengers is operated between the Anaconda mine and the surrounding communities. Western Truck Lines makes daily delivery of mail and freight to Darwin and the Anaconda property. A contract motor carrier of ore also operates runs between the town of Lone Pine and the Anaconda mine. By arrangement between employees and prospective employees and the driver, such ore carriers provide free transportation for Anaconda employees and prospective employees between their terminal points and intermediate points en route. Up to 2 additional persons may ride in the cab with the driver. These runs are made usually about six times per day although sometimes they will be as frequent as once or twice an hour. These rides are voluntary and no record of them is kept. The chief mode of passenger transportation between the mine properties and Darwin and between Darwin and the nearby communities is by private automobile. Approximately 50% of the employees of Anaconda who reside at defendants' lodging facility own their own vehicles and regularly use them for purposes of commuting to and from the mine or the nearby communities. The remaining employees normally will ride with these employees or in vehicles operated by other Anaconda employees when there is a need or occasion for transportation.

The roads to Darwin are rarely impassible because of the weather and then only for very short periods during which they are being cleared, although the area is subject to occasional snow.

(7) The town of Darwin is located approximately one mile from the Anaconda facility over a black-top paved two-lane highway. The Anaconda facility is located between Darwin and S Highway 190, which highway

runs from Lone Pine into Panamint Valley. A true representation of the town of Darwin taken in a southerly direction on a road leading from State Highway 190 to the Anaconda mine is attached to the Stipulation as Exhibit E. A true representation of the Anaconda housing area taken in an easterly direction is attached to the Stipulation as Exhibit F. The town of Darwin contains as service station, post office, and the following additional establishments: A restaurant, known as Darwin's Cafe, serves meals during the following hours: Saturday and Sunday, 10:00 a.m. to 2:00 a.m.; Monday, Tuesday and Wednesday, 12:00 noon to 9:00 p.m.; closed Thursdays; Friday, 12:00 noon to 2:00 a.m. Posted prices are as follows:

Hamburger Sandwich	$ .50
Cheeseburger	.60
Chili & Beans	.50
Hamburger Steak	1.75
Rib Steak	2.25
Bacon & Eggs	1.25
Ham & Eggs	1.25
Pie	.20 and .25

Exhibit G, which is attached to the Stipulation, is a true representation of the exterior of Darwin's Cafe. Exhibit H, attached to the Stipulation, is a true representation of the interior of the lunch counter in the Darwin Cafe. Exhibit I, attached to the Stipulation, is a true representation of the interior of the bar immediately adjacent to the lunch counter and connecting thereto in the Darwin Cafe.

In addition to the Darwin Cafe, an establishment known as Crosson's is located in Darwin. This establishment

is engaged in the selling and serving of hamburgers, chili and beans, ham sandwiches and similar items, as well as beer and soft drinks. True representations of the exterior and interior of Crosson's are attached to the Stipulation as Exhibits J and K, respectively.

Darwin also contains an establishment known as Taylor's, which is a combination grocery store and dispenser of soft drinks. A true representation of the exterior and interior of Taylor's is attached to the Stipulation as Exhibits L and M, respectively.

In addition to the above-noted facilities, a general store is located on the Anaconda property not far from the highway to Darwin, which store is known as Lurcott's. A true representation of Lurcott's store is attached to the Stipulation as Exhibit N. Lurcott's store is privately operated and located on property leased from Anaconda. A general grocery business, including the sale of meats and produce, is conducted in this establishment between the hours of 8:30 and 11:30 and 12:30 and 5:30, six days a week. A Civil Aeronautics Authority approved airport is located at Darwin, consisting of a single runway with no adjacent building. There are no public lodging facilities in Darwin. At least one employee living at defendants' facility owns a home in Darwin. Darwin is built on property not owned by Anaconda. The population is 125.

(8) The town of Olancha is located on the main Los Angeles-Reno highway, known as U. S. Highway 395. It is approximately 34 miles from Darwin over a blacktop paved highway. Olancha contains 3 restaurants as well as three motels. Housing facilities with cooking facilities are also available. These facilities rent for

$15.00 per week and will accommodate 12 persons. Motels are available for $3.00 a day—single occupancy. One motel has seven cabins at the single rate of $3.00. A true representation of these restaurants is attached to the Stipulation as Exhibits O through Q. It is the community center for several mining, chemical and ranch companies. Olancha has a population of approximately 200.

(9) The town of Keeler is located on State Highway 190 between Darwin and Lone Pine. It is approximately 23 miles from Darwin. Keeler contains an establishment known as the Desert Club which serves short orders and meals upon a limited basis. A true representation of the exterior of this establishment is attached to the Stipulation as Exhibit R. A true representation of the interior of this establishment is attached to the Stipulation as Exhibit S. Keeler also contains, among other facilities, a grocery store, a true representation of which is attached to the Stipulation as Exhibit T. The population of Keeler is approximately 150.

(10) Panamint Springs is located on State Highway 190 and is approximately 23 miles over a black-top two-lane paved highway from the Anaconda property. Panamint Springs contains a restaurant and a motel to accommodate thirty persons and is open to the general public. A true representation of this restaurant is attached to the Stipulation as Exhibit U. Complete meals may be obtained at the following prices: Breakfast $1.75; lunch, $1.00, and dinner, $2.00. A true representation of the motel accommodations is attached to the Stipulation as Exhibit V. The population of Panamint Springs varies between 10 and 12. The per day rate for accommodation is $4.00 single and $5.50 double.

(11) The town of Lone Pine is located on U. S. Highway 395, approximately 38 miles over State Highway 190 and the connecting road from Darwin. Lone Pine contains several restaurants, motels, a hotel, boarding houses, and rooming houses available to persons employed by various mining, chemical and ranch companies in the area as well as to the general public. A true representation of the main street of Lone Pine is attached to the Stipulation as Exhibit W. A true representation of Highway 190, taken in a northwesterly direction toward the town of Lone Pine, is attached to the Stipulation as Exhibit X. The population of Lone Pine is approximately 1,415.

(12) A map, depicting the southern portion of the State of California and showing the location of Darwin, California, with reference to other California cities, is attached to the Stipulation as Exhibit Y. A map, depicting in more detail the area and communities immediately surrounding Darwin, California, is attached to the Stipulation as Exhibit Z.

(13) Defendants' employees normally work a scheduled workday consisting of 8 hours, 7 days a week although the number of hours worked per day may occasionally fluctuate. They thus normally work fifty-six hours a week. The employees indicate on a daily time record sheet the days upon which they report for work. No specific record of hours as such is maintained.

(14) Defendants' employees are paid at a specified daily rate, the total pay being based on the number of days worked during the payroll period. Wage payments are made on the 10th and 25th of each month.

(15) The employees of Anaconda are not confined to Anaconda property or required by Anaconda to eat or

lodge at any particular place. The employees will return to their homes during the lunch hour, or will bring their own lunches with them to the Anaconda facilities. Employees, of course, working in the mine who cannot practically leave the working area, will eat lunches at their place of work.

(16) During the six months' period ending July 31, 1953, the project cost per meal has averaged approximately $1.00. The project cost consists of all costs to defendants of the operation except home office salaries and expenses referred to hereafter. The project cost per meal consists of the direct cost to defendants of providing meals plus the project overhead or indirect costs such as telephone, insurance, manager's salary, et cetera, allocable to meals as distinguished from commissary and lodging. Since February 7, 1952, pursuant to a written amendment to the agreement referred to herein of that date, the price of meals and lodging to Anaconda employees has been $2.60 per day for three meals and $.60 per day for lodging. The price of meals to all persons other than those who reside in defendants' facility has been and is $1.50 per meal. Between October, 1950, and February, 1952, the corresponding prices were $2.25 per day for three meals and $.60 per day for lodging.

The cost to Anaconda has averaged approximately $.30 per meal. This amount is obtained by dividing the number of meals served into the total of the amounts paid by Anaconda to the defendants, the estimated cost of fuel, water and power, and the estimated value of the use of equipment and supplies.

The housing and commissary facilities have operated at a profit. The project profit for the housing and com-

missary facilities, respectively, for the period from January to July, 1953, inclusive, was as follows:

	Commissary	Housing
January	$512.71	$484.62
February	532.21	446.24
March	673.02	472.39
April	400.82	325.44
May	605.04	408.05
June	655.38	428.61
July	410.13	468.34

During the seven months from January through July, inclusive, the total project profit (+) or loss (—) incurred by the defendants in the operation of its Darwin facilities was as follows:

January	(—)	$ 616.96
February	(—)	268.88
March	(—)	249.98
April	(—)	1,171.51
May	(—)	674.27
June	(+)	301.72
July	(+)	24.34

The salaries and expenses of the home office (non-project) allocable to the Darwin operation are borne by defendants and are not chargeable to Anaconda. Such cost items include the salaries of the comptroller and a secretary-bookkeeper. The home office work includes executive, administrative, purchasing, warehousing, accounting, payroll, billing and correspondence functions. The average amount of such costs is approximately $1,500.00 per month, one-third of which is properly allocable to the Darwin operation.

(17) At its Darwin establishment, defendants' employees consist of a manager, a chef, commissary clerk, second cook, dishwashers, waiters, combination man and janitors. The parties agree that the commissary clerk is outside the scope of coverage of the Act. Plaintiff also concedes that even assuming coverage the manager is exempt under Section 13(a)(1) of the Act. Defendants' other employees perform the following duties:

Chef: His rate is $90.93 per week plus board and lodging. The chef is responsible for preparation of all foods and efficient serving thereof. In collaboration with the manager, he makes up daily menus. He is directly responsible for the dining room and kitchen crew and he has the authority to hire and fire in his department. He makes up requisitions for supplies and on occasion prepares food to take out by anybody who desires to buy food to take out. He also has the authority to make local purchases if needed. He also prepares all bakery products with the exception of bread.

Second Cook: His rate is $61.46 per week plus board and lodging. The second cook assists the chef in the preparation of all foods, including bakery products. It is customary for him to prepare the morning breakfast so that the chef can come in at a later hour. The second cook is capable of taking over the chef's job when the occasion demands. This can happen and does happen once in a while. The second cook works under the direct orders of the chef and does any and all work assigned to him by the chef.

Dishwasher: His rate is $40.25 per week plus board and lodging. The dishwasher washes dishes. He is responsible for his dishwashing department and the dishwashing machine and other equipment installed therein.

He also does general clean-up work in and around the kitchen as required. He also washes pots and pans as required.

Waiter: His rate is $40.25 per week plus board and lodging. A waiter serves food to the customers seated at tables in the dining room. Each waiter has a station consisting of four tables of eight places each. A waiter keeps his station clean, cleans the tables after each meal and resets them. He also, with other waiters, sweeps the dining room and once or twice a week mops the dining room floor.

Combination Man: His rate is $40.25 per week plus board and lodging. This man is qualified to wait on tables and to wash dishes but his primary job is to help keep the kitchen and the equipment clean. This man also peals vegetables and does miscellaneous odd jobs delegated to him by the chef. He also helps to unload supply trucks and stores supplies in the storeroom.

Janitor: His rate is $40.25 per week plus board and lodging. A janitor does janitor work. He is responsible for keeping the dormitory building clean and in order. He makes beds, handles linens and blankets and miscellaneous bedding. He sweeps floors, keeps bathrooms and showers clean and does related work. He also, on occasion, relieves the commissary clerk.

(18) Attached to the Stipulation as Exhibit BB is the Collective Bargaining Agreement between Anaconda and Local Union No. 841 of the International Union of Mine, Mill and Smelter Workers together with a Supplement thereto dated September 15, 1952, and an Amendment thereto orally agreed to but not yet signed. This agreement covers employees of Anaconda at the Darwin mine operation as defined therein.

(19) In the event that the sales and services provided by defendants at their Darwin operation should be curtailed or abandoned entirely there would be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof.

(20) Defendants' facilities are maintained for Anaconda employees as a convenience only, and to a very limited extent the mess hall serves others. In the event such activity were curtailed or abandoned some employees using defendants' facilities might leave the Darwin area. Assuming, however, that as many as one-half of the employees should leave, such employees could be replaced normally within a relatively short time. Those who did not leave could obtain lodging and meals elsewhere in the vicinity. Lodging could be and has been obtained at the housing facilities located at the mine, by purchasing or renting trailers, or in the neighboring communities either by renting or in homes owned by employees. Meals, groceries, and commissary and similar items could be obtained at Lurcott's Store, at eating and grocery establishments located in Darwin, and in the surrounding communities. Such facilities would in all probability respond to any increased demand.

Defendants' facilities are not remote and isolated to such an extent that it is removed from ordinary business competition. It is a situation different from one in which the activity is located in a remote and isolated area where competition is nonexistent.

(21) Defendants' type of facility has become less and less frequent as a means of providing food and lodging for mining employees. Because of improved roads, better transportation and an increased desire for community living such employees are tending more and more to prefer to live in communities even at considerable distances from their place of work. It is frequent that persons employed in mining operations will live in communities at a distance of thirty to forty miles from their places of work and will commute daily by automobile, bus or other means of transportation.

(22) On several occasions in mining communities in the western states, facilities similar to those of defendants' and under circumstances similar in material respects to those of defendants' Darwin operations have been curtailed or abandoned without affecting either the production of the mine or the availability of employees. Typical of such a situation is the Mountain City Copper Company operation, located about four miles from the town of Mountain City, Utah, where a facility similar to that of defendants' was established. Family facilities —houses and apartment units—were available for about 150 families. About 100 single men obtained lodging and meals at a facility similar to defendants' operated by an independent contractor. During a period of some 12 years from 1935 to 1947, the number of persons who utilized this facility steadily decreased until at the end of the period it had been discontinued entirely and had been taken over by a man and his wife who provided lodging and meals for 18 to 20 employees. The remaining 75 or 80 were lodging and eating elsewhere, or rotating between the various facilities in the area. During the same period, people in the town of Mountain City—

population about 200 in 1935—began taking in boarders. Eventually, there were two rooming houses and a hotel operating in the town. The mine facility became unattractive as a business proposition. Its discontinuance did not affect the production of the mine. During the period involved the number of employees remained at approximately 300.

In another instance, an Anderson-type facility under similar circumstances was completely destroyed by fire. It has not been rebuilt. In still another—the United States Mining Co., near Bingham, Utah—shut down its lodging and boarding facility entirely in 1946. The employees in each case who formerly lived and ate at the Anderson-type facility continued their employment and obtained their lodging and meals elsewhere. In some cases, the facilities in nearby towns expanded to take care of the increased demand. In others the employees located in communities at some distance from the mine and commuted daily. In still others, the employees obtained housing facilities and provided their own meals. Neither production nor the availability of employees was substantially affected.

In many mining operations, no facilities such as defendants' have existed at all. Persons employed at such mining operations have lived or are living at distances ranging from 30 to 38 miles and commute by automobile or bus daily to and from the mine. In some cases as many as one-half of the employees at the mine will so commute. Among several specific instances are the Utah-Delaware Mining Company and other mining operations in Bingham Canyon, Utah, and the National Tunnel and Mines Company, Tooele, Utah.

(23) In 1945 production at the Darwin mine amounted to 150 tons per day. There were 6 housing units and 20 trailers at the mine; and defendants' facilities were somewhat more utilized than today. During 1953, production has been approximately 450 tons per day. There are 61 housing units and 37 trailers at the mine; and an average of 62 persons reside in defendants' facilities. During this period employment has correspondingly increased at the mine.

(24) Children of persons employed at the mine attend school at Darwin up to the eighth grade; children in higher grades attend school in Lone Pine, commuting daily by bus. Up until 2 years ago seventh and eighth grade students also commuted to Lone Pine, but now attend school in Darwin.

(25) Employees living in family-housing units as distinguished from the Anderson facility tend to have a more stable employment relationship. The turnover rate among non-family men who reside in defendants' facilities is substantially higher than is true among those who lodge and eat elsewhere. Employees who upon obtaining employment at the mine reside and eat at defendants' facilities frequently will leave such facilities and obtain lodging and their meals elsewhere without affecting their employment with Anaconda. During the month of August, 1953, at least three employees, after having lived at defendants' facilities, left to obtain lodging and their meals elsewhere without having severed their employment with Anaconda. So many factors affect the supply of labor that the presence or absence of defendants' type of facility would not be a deciding or important factor in the existence of a labor supply.

(26) All of defendants' annual dollar gross income at the Darwin operation results from the furnishing of goods and services within the State of California.

(27) All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact and any Conclusion of Law that is contained therein is hereby expressly incorporated in these Conclusions of Law with the same force and effect as though expressly set forth therein.

(2) None of defendants' employees are engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act as amended.

(3) None of defendants' employees are employed in producing, manufacturing, mining, handling, transporting or in any other manner working on goods for commerce within the meaning of the Fair Labor Standards Act of 1938 as amended.

(4) None of defendants' employees are employed in any closely related process or occupation directly essential to the production of ore by Anaconda for commerce within the meaning of the Fair Labor Standards Act of 1938 as amended. The Anaconda facility is not remote and isolated and the subsistence activities are not closely re-

lated or directly essential to production within the meaning of Section 3(J) of the Act.

Let Judgment Be Entered Accordingly.

Dated: January 15th, 1954.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Presented and Approved:

By /s/ WILLIAM FRENCH SMITH,
GIBSON, DUNN & CRUTCHER,
Attorneys for Defendants.

Approved as to form:

UNITED STATES DEPARTMENT OF LABOR,

By /s/ GEORGE E. DUEMLER,
Attorney, Attorneys for Plaintiff.

Lodged January 14, 1954.

[Endorsed]: Filed January 15, 1954.

In the United States District Court for the Southern District of California, Central Division.

Civil Action File No. 15079-C.

Martin P. Durkin, Secretary of Labor, United States Department of Labor, Plaintiff, vs. Harold S. Anderson, Jr., *et al.,* Defendants.

Judgment Denying Demand for Injunction and Other Relief.

This cause having duly come on for trial on October 13, 1953, at 10:00 a.m. before the Honorable James M. Carter, judge presiding, George E. Duemler appearing as counsel for plaintiff, William French Smith, of Gibson, Dunn & Crutcher appearing as counsel for defendants and the Court having heard and considered the evidence both oral and documentary offered by the respective parties and the matter having been submitted to the Court for decision, and the Court being fully advised in the premises, and having made and filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith.

Now, Therefore, by reason of the findings and law aforesaid, It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by reason of its action against the defendants or any of them; that plaintiff's demand

for injunction be and the same is hereby denied; and that the plaintiff's complaint be and it hereby is dismissed.

Dated: January 15th, 1954.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Presented and Approved:

By /s/ WILLIAM FRENCH SMITH,
GIBSON, DUNN & CRUTCHER,
Attorneys for Defendants.

Receipt of copy acknowledged.

Lodged November 16, 1953.

[Endorsed]: Filed January 15, 1954.

Docketed and entered January 18, 1954.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant, vs. Harold S. Anderson, Jr., Robert W. Anderson, and Alfred F. Ohl, Individually and as Copartners, Doing Business as H. S. Anderson Company, Appellee. No. 14,327.

Aug. 25, 1955.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and FEE, Circuit Judges, and WIIG, District Judge

STEPHENS, Circuit Judge

A place called Darwin, less than 150 population, lies in the Mojave desert in California, and may be likened to a trading post for those who are engaged directly and indirectly in the mining industry of the Anaconda Copper Mining Company whose "Darwin Mine" is located about a mile from the town and is operated in two shifts under approximately 250 employees. The product moves in interstate commerce. The business part of the town consists of a post office, an automobile service station, a small short-order lunch counter, a small sandwich and chili lunch place, and a grocery store. The sandwich shop opens at 10:00 A. M., but is closed Thursdays, Saturdays, and Sundays. A paved highway connects the town with Keeler, population 150, twenty-odd miles away; Olancha, population 200, about 35 miles away; Panamint Springs, population 12, about 15 miles away; and Lone Pine, population about 1500, around 40 miles away. There are meager accommodations at each of these places. There is no pub-

lic passenger service in or out of the town. There are no privately operated rooming houses in Darwin, and no public dining places other than the lunch places mentioned. Anaconda owns some house trailers and some small houses in which some of its employees live, and there are a few privately owned houses in which employees live.

Prior to November, 1945, Anaconda owned and operated a bunk house and mess hall adjacent to the mine in which some of its male employees were accommodated. Subsequently to said date, Anaconda entered into a contract with H. S. Anderson Company under which Anderson (referred to in the contract and in its opinion as "Operator") took over the possession and operation of the facility mentioned. It is of some importance to note that Anaconda kept a strong guiding hand over Operator in the operation of the facility. Neither before nor after Operator took over was the facility run as a profit to Anaconda. Operator has run the facility under a minimum profit guaranteed by Anaconda. The contract further provides that Anaconda shall furnish equipment including expendable items, though not replacement thereof, garbage and refuse disposal. Operator is required to furnish meals to employees at hours suitable for the two shifts worked, and the food shall be wholesome and under Anaconda's direction. Operator shall procure and pay for public liability and property damage insurance, as Anaconda prescribes, and the contract may be cancelled upon 30 days' notice from either party. Payment for facilities used by Anaconda's employees is deducted from their wages and made over to Operator.

The facility accommodates occasional visitors for a flat price per meal. Guests of the mine management are occasionally accommodated at the messhall, and Anaconda compensates appellee therefor.

In operating under the contract, Operator employs eleven men who, the Secretary of Labor claims, are within the provisions of the Fair Labor Standards Act (1938) as employees under Section 3(j)[1] of the Act which defines the term "produced" and delimits the employees who come under the Act, as follows:

> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any State." [Emphasis added.]

Prior to 1949, the Act, in addition to covering employees who worked directly upon the goods produced, covered those who were engaged in any process or occupation "necessary" to the production of the goods.

The trial court found that the occupation of the employees within the facility are not essential to Anaconda's production of goods since Anaconda's employees at the mine could reasonably have secured board and lodging otherwise than through the mess hall and bunk house facility. Accordingly, the employees within the facility were held to be outside the coverage of the Fair Labor Standards Act. The Secretary of Labor is here appealing from the judgment entered.

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[1]Title 29 U. S. C. A. §203, June 25, 1938, c. 676, §3, 52 Stat. 1060; 1946 Reorg. Plan No. 2, §1, eff. July 16, 1946, 11 FR 7873, 60 Stat. 1095; as amended October 26, 1949, c. 736, §3, 63 Stat. 911.

It was said in *Kirschbaum Co. v. Walling,* 1942, 316 U. S. 517, 524: "But the provisions of the Act expressly make its application dependent upon the character of the employees' activities." And in *Walling v. Jacksonville Paper Co.,* 1943, 317 U. S. 564, 571, we find: "The applicability of the Act is dependent on the character of the employees' work." And we said in *Tipton v. Bearl Sprott Co.,* 1949, 9 Cir., 175 F. 2d 432, 435, that "* * * the applicability * * * is determined, not by the nature of the employer's business, but by the character of the employee's activities."

It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as "necessary" or as "essential" as those who work in the "factory" proper. Such is the broad principle of our *Consolidated Timber Co. v. Womack* case, (9 Cir., 1942, 132 F. 2d 101, 106.) The *Womack* case concerned the status of men employed in two cook houses conducted by a logging company. There was a lower cook house in a village providing more public eating facilities than Darwin provided in our case. The trial judge found that the employees in this lower cook house were not within the coverage of the Fair Labor Standards Act. The upper cook house was deeper in the woods, and other facilities were somewhat less than those at Darwin. The trial judge found that the employees in the upper location were within the coverage of the Act. This court, at p. 106 in a comprehensive opinion written in 1942 (before the Act's amendment) by the late Circuit Judge Francis A. Garrecht, ruled that the employees in both cook houses were within the Act, quoting from *Kirschbaum*

Co. v. Walling, 316 U. S. 517, 525, 526, as follows: "* * * In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" See, also, *Hansen v. Lagerstrom,* 8 Cir., 1943, 133 F. 2d 120; and *Kirschbaum Co. v. Walling,* 1942, 316 U. S. 517, *supra.*

And this principle is not governed by whether the facility was absolutely necessary to any operation of the enterprise. In the *Womack* case, *supra,* it would have been possible for food to have reached the men so that some lumbering could have been done. In our case the mine in all probability could continue in operation in some manner without the mess hall and the bunk house. However, in each instance the facility furnished was without a question needed, and without it the production would have been affected. We are of the opinion that the employees within the facility were pursuing an occupation which, in the circumstances, was directly essential to the production of the ore for commerce, just as in *Womack* the employees in the cookhouses were performing a service *necessary* for the production of logs for commerce.

We are not unmindful of the cause for the amendment to the Act, as revealed by committee reports and Congressional debates. Some courts, in construing the Act before the amendment, gave the word "necessary" a very broad meaning. That is, the work done was held to be necessary if it was useful and needed in the production of goods. There was no formula possible for the exact separation of employment within the Act, from employment outside the Act, and the coverage appears to have been extended be-

yond the Congressional intent to employees in activities not directly contributing to the production of goods. The amendment was intended to cut off incidental or fringe coverage. We think the undisputed facts of this case bring it outside the change in the coverage intended or accomplished by the amendment and that the broad principles pronounced in the *Womack, Hansen,* and *Kirschbaum* cases, *supra,* remain unchanged.

Such is the basis for our own opinion in *General Electric Co. v. Porter,* 9 Cir., 1953, 208 F. 2d 805. And in the opinion written by Judge Soper, in *Hawkins v. E. I. DuPont De Nemours & Co.,* 4 Cir., 1951, 192 F. 2d 294. Each of these two latter cases was decided after the amendment.

Appellee's contention that *McLeod v. Threlkeld,* 1943, 319 U. S. 491, overrules or weakens *Consolidated Timber Co. v. Womack, supra,* cannot be sustained. The *McLeod* case is not concerned with the "production of goods for commerce" but with the subject of "in commerce". The opinion clearly states the difference. In our estimation, the cited case in no sense weakens the *Womack* case.

It would seem that the trial court was of the opinion that the mess hall and the bunk house were mere conveniences and that the operation of the mine would go on without material change if these conveniences were not available. We think the doctrine of *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 395, applies, namely, that upon consideration of the evidence as a whole, we are convinced that a mistake has been made.

The evidence in our case is not: Could Anaconda possibly continue its operation in some sort of way without the facility?

Rather, it is: Is there substantial need for it and for Anaconda's provision for it?

Is it clear that Anaconda is mistaken in its judgment that its outlay and continued investment in the facility is reasonably needed in order that the employees shall be fed wholesome food and be properly and conveniently housed? Is it clear that the hiring of men and the continuity of service would not be made substantially difficult if the facility should be abandoned? Can it reasonably be assumed that the type of employee who fills these not altogether choice or comfortable jobs has an automobile to transport himself daily from twenty to forty miles and back to his room and board in the towns mentioned? These and other questions present themselves when the need for the facility is under consideration. We hold that the evidence permits of no other conclusion than that Anaconda's furnishing of the facility was essential to its business.

It was contended by Operator in the district court, and here, that his employees are outside the coverage because they are employed in a retail establishment under §13(a)(2) of the Act.[2] The court made no finding on that issue. The trial judge was of the opinion that the employees in the facility were not in an occupation directly essential to Anaconda's production of goods. Under such holding, the court no doubt thought it was unnecessary to make a finding on the issue mentioned. However, since we take a different view of what may be termed the main issue, the other issue assumes a new importance.

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[2]Title 29 U. S. C. A. §213(a)(2), June 25, 1938, c. 676, §13, 52 Stat. 1067; Aug. 9, 1939, c. 605, 53 Stat. 1266, as amended Oct. 26, 1949, c. 736, §11, 63 Stat. 917.

It was testified by one who qualified as an expert that the facts of this case constitute the facility a retail establishment, or that it would be so considered by an established restaurant association as to which he occupied an official position. However, we are of the opinion that the evidence conclusively establishes, as we have concluded, that the facility is an integrated part of the Anaconda enterprise and that such conclusion is inconsistent with any conclusion that it is a retail enterprise. See *Consolidated Timber Co. v. Womack,* 9 Cir., 1942, 132 F. 2d 101, on this point.

We therefore do not believe it useful or necessary to remand the case for further findings. See *Sbicca-Del Mac v. Milius Shoe Co.,* 145 F. 2d 389, 400[28].

It is contended by appellees that they are independent contractors and are running a business as such. This claim may be technically sound, but we think it does not change the status of the employees within the facility. Realistically, appellees are managing the facility for Anaconda, and as a facility directly essential for Anaconda's enterprise.

Judgment is reversed.

(Endorsed:) Opinion. Filed Aug. 25, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant, vs. Harold S. Anderson, Jr., Robert W. Anderson, and Alfred F. Ohl, Individually and as Copartners, Doing Business as H. S. Anderson Company, Appellee. No. 14,327.

Aug. 25, 1955.

Dissenting Opinion.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and FEE, Circuit Judges, and WIIG, District Judge

JAMES ALGER FEE, Circuit Judge, dissenting:

This case should have been affirmed or at most remanded for further findings of fact.

The majority have made two vital and essential findings without which the conclusion reached cannot be supported:

(a) It was found by implication that "The employees of H. S. Anderson Company are engaged in the production of goods for commerce."

(b) It is expressly found in the opinion that "the facility is an integrated part of the Anaconda enterprise" and not a "retail establishment."

The first finding is a pillar which must be present to uphold the judgment this Court directs to be entered. The second is no less essential under §13(a)(2) of the Fair Labor Standards Act. The writer expresses no opinion on these postulated facts, except to say that the trial court did not make them and that there is conflicting evidence. But the authority of this Court does not extend to making findings of fact.

The trial court did make pertinent findings which are not held clearly erroneous but the effect of which are avoided by the suggestion that, on the record as a whole, another result must be reached. But, if this be true, the case should be sent for reconsideration and new findings. The findings of fact of the trial court, which seem supported by almost uncontroverted evidence, are set out in the margin.[1]

The majority opinion uses the phrase that the facilities are "reasonably needed," instead of the statutory text which excludes coverage unless these are "closely related or directly essential" to the mining operation. The general intention of Congress to restrict the boundaries of coverage of the Act, which was evidenced by the amendment of 1949, has thus been disregarded by the majority opinion.

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[1]The findings of fact were set forth verbatim in this opinion. They are included in this Appendix on page 4.

(Endorsed:) Dissenting Opinion. Filed Aug. 25, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant, vs. Harold S. Anderson, Jr., Robert W. Anderson and Alfred F. Ohl, Individually and as Copartners, Doing Business as H. S. Anderson Company, Appellees.

No. 14327.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment. Filed and entered August 25, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant, vs. Harold S. Anderson, Jr., Robert W. Anderson, and Alfred F. Ohl, Individually and as Copartners, Doing Business as H. S. Anderson Company, Appellees. No. 14327.

July 30, 1956.

Order Upon Reargument.

Before: STEPHENS and FEE, Circuit Judges, and WIIG, District Judge

PER CURIAM:

The petition for rehearing is denied. We append the following citations of pertinent decisions:

Mitchell v. Joyce Agency, 348 U. S. 945;

Mitchell v. Vollmer & Co., 349 U. S. 427;

Maneja v. Waialua Agricultural Co., 349 U. S. 254;

Alstate Construction Co. v. Durkin, 345 U. S. 13;

Mitchell v. King Packing Co., 350 U. S. 260, rehearing denied 350 U. S. 983;

Steiner v. Mitchell, 350 U. S. 247;

Mitchell v. Budd Tobacco Co. and King Edward Tobacco Co., 350 U. S. 473.

See, also:

Mitchell v. Myrtle Grove Packing Co., 350 U. S. 891;

General Electric Co. v. Porter, 9 Cir., 208 F. 2d 805, certiorari denied 347 U. S. 951;

Tobin v. Ramey, 5 Cir., 205 F. 2d 606, 206 F. 2d 505, cert. den. sub nom. *Hughes Constr. Co. v. Mitchell,* 346 U. S. 925;

Durkin v. Fisher, 7 Cir., 204 F. 2d 930, cert. den. sub nom. *Fisher v. Durkin,* 346 U. S. 897;

Stewart-Jordan v. Tobin, 5 Cir., 210 F. 2d 427, cert. den. sub nom. *Stewart-Jordan v. Mitchell,* 347 U. S. 1013;

Mitchell v. Pilgrim Holiness Church, 7 Cir., 210 F. 2d 879, cert. den. sub nom. *Pilgrim Holiness Church v. Mitchell,* 347 U. S. 1013;

Mitchell v. Famous Realty Co., 2 Cir., 211 F. 2d 198, cert. den. sub nom. *Famous Realty Co. v. Mitchell,* 348 U. S. 823;

Chapman Fruit Co. v. Durkin, 5 Cir., 214 F. 2d 630, cert. den. sub nom. *Chapman Fruit Co. v. Mitchell,* 348 U. S. 897;

Fort Mason Fruit Co. v. Durkin, 5 Cir., 214 F. 2d 363, cert. den. sub nom. *Fort Mason Fruit Co. v. Mitchell,* 348 U. S. 897;

Mitchell v. Brown Engineering, 8 Cir., 224 F. 2d 359, cert. den. sub nom. *Brown Engineering v. Mitchell,* 350 U. S. 875;

Tilbury v. Mitchell, 5 Cir., 220 F. 2d 757, cert. den. sub nom. *Tilbury v. Rogers,* 350 U. S. 839.

Judge Fee adheres to his dissent.

(Endorsed:) Opinion and Dissent. Filed July 30, 1956.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 460

HAROLD S. ANDERSON, JR., AND ALFRED E. OHL, INDIVIDUALLY AND AS COPARTNERS, DOING BUSINESS AS H. S. ANDERSON COMPANY, PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court's oral opinion and findings of fact and conclusions of law (Pet. App. 1–23) are unreported. The opinion of the Court of Appeals (Judge Fee, dissenting) (Pet. App. 26–35) and the court's order denying the petition for rehearing (Pet. App. 37) are reported at 235 F. 2d 638.

JURISDICTION

The judgment of the Court of Appeals was entered August 25, 1955 (Pet. App. 36). A petition for re-

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hearing was denied July 30, 1956 (Pet. App. 37–38). The petition for certiorari was filed September 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner operates bunkhouse and messhall facilities, owned by an interstate mining company and "leased" to petitioner under an arrangement fully financed and subsidized by the mining company, for the specific and practically exclusive purpose of supplying the subsistence needs of employees essential to the operation of the mine, which is located in an isolated spot in the Mojave Desert where adequate subsistence facilities are otherwise unavailable. The questions presented are:

1. Whether petitioner's operation is a "closely related process or occupation directly essential" to the mining operation within the meaning of Section 3 (j) of the Fair Labor Standards Act, as amended.

2. Whether such bunkhouse and messhall facilities, which are not ordinarily open to the general consuming public, are "retail or service establishments" within the meaning of Section 13 (a) (2) of the Act.

3. Whether employees engaged in operating such bunkhouse and messhall facilities are "employed in a local retailing capacity" within the meaning of Section 13 (a) (1) of the Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910,

29 U. S. C. 201 *et seq.*, the pertinent provisions of which are set forth in the petition, p. 3.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioners, co-partners doing business as H. S. Anderson Company, from violating the overtime and record-keeping requirements of Section 7 and 11 (c) of the Fair Labor Standards Act, as amended. The violations charged relate to approximately 11 employees engaged in operating the bunkhouse and messhall facilities at the Anaconda Copper Mining Company's Darwin Mine located in the Inyo Mountains near Death Valley, California. The Anaconda Company is admittedly engaged, at its Darwin mine, in the mining and milling of lead, silver and zinc ores, for shipment in interstate commerce (Stip., R. 15, 16). In these operations, Anaconda employs approximately 236 employees, including some 126 underground miners and some 62 "surface" men who work in the mill, in the shop, and as electricians, drivers, etc. (Fdg. 3, R. 55).

1. The Darwin mine is located in a remote and isolated area about a mile from the town of Darwin which lies in the Mojave desert in California (opinion below, Pet. App. 26; see also map of Death Valley and Vicinity, R. 50). There are no eating and lodging facilities at the mine other than the messhall and bunkhouse here involved, and there are no other lodging or eating facilities in the vicinity adequate to accommodate the employees for whom the bunkhouse and messhall are maintained. The town of Darwin,

with a population of 125, has no rooming houses and has only two small eating places, both of which are little more than lunch counters for short orders, obviously inadequate to meet the subsistence needs of the mine workers. The largest one has only seven or eight stools capable of accommodating only a handful of persons at a time (Pltfs. Exhs. G, H and I), and is not open for business during weekdays before 12 noon, and is closed altogether on one weekday (R. 21). The only other eating place has even more meager accommodations (Pltfs. Exhs. J and K), and serves only beer and soft drinks, and hamburgers, chili and beans, and sandwiches (R. 59, 60).

The next nearest towns are Keeler, population 150, which is 23 miles distant; Panamint Springs, population 12, which is 23 miles distant; Olancha, population 200, which is 34 miles distant; and Lone Pine, population 1,500, which is 38 miles distant (Fdgs. 8, 9, 10, 11; Pet. App. 11–13). There are only meager accommodations at each of these places and no public transportation service between Darwin and any of them (opinion below, Pet. App. 26–27).

2. The bunkhouse and messhall at the mine are owned by the Anaconda Company, and prior to November 1, 1945, the Anaconda Company itself operated these facilities (Fdg. 2, Pet. App. 5). Since that date the facilities have been operated by petitioners pursuant to a so-called "subsistence agreement," under which the premises are "leased," but with no rental charge, to petitioners "for the conduct of subsistence operations" for Anaconda's employees and occasional authorized guests and visitors "exclu-

sively" (Exh. A, R. 32, 35, 36). Not only are the facilities owned and their operation completely financed by the Anaconda Company, but, as stated by the Court of Appeals, Anaconda has "kept a strong guiding hand over Operator [as petitioner is designated in the subsistence agreement] in the operation of the facility" so that "[r]ealistically" petitioners are simply "managing the facility for Anaconda" as "an integrated part of the Anaconda enterprise" (Pet. App. 27–33).

The accuracy of this characterization of petitioners' operation is evident from the terms of the "subsistence agreement" itself (Exhs. A and B, R. 32–47). Petitioners are described in the agreement throughout as "Operator." Under its terms, not only does Anaconda furnish the premises free of rent, but it furnishes the light, power, heat, fuel, gas, hot and cold water, telephone service, and agrees to maintain, repair and service all of the premises and facilities "without charge to Operator," and to furnish garbage and refuse disposal service "without cost to Operator" (R. 39). Anaconda also furnishes all necessary "bunkhouse, mess hall, kitchen and office equipment," and it made the initial investment necessary to furnish "an adequate supply of expendable items required for said operation," including bedding, blankets, china and similar items (R. 39–40). Petitioners are also not required to make any outlay for operating expenses, for Operator is reimbursed monthly for all operating expenses and in addition is guaranteed a gross monthly "profit" of $750 (R. 44, 46, 47).

The agreement requires Operator to use the premises "exclusively for the purposes" set forth in the

agreement, which are limited to serving Anaconda's employees and occasional authorized guests and visitors (R. 35, 36). Operator is required to furnish wholesome daily meals "as directed by Anaconda," with the quality and variety of food served subject to Anaconda's approval (R. 42). The charges to be made for room and board and meals were fixed by the agreement, with provision that they be collected by Anaconda through a payroll deduction plan (R. 42). Operator is required to maintain detailed accounts and records which "shall at all times be subject to inspection, audit and review" by Anaconda (R. 43–44), and to furnish Anaconda "with detailed monthly operating statements" accompanied by invoices for amounts due for the month covered by the statement, and Anaconda agrees to pay petitioners the settled amount of each monthly invoice within 15 days after rendition (R. 44). Anaconda reserves the right of inspection and entry on the premises (R. 41), and requires Operator to procure liability, property, and employees' compensation insurance (chargeable to operation expenses) in an amount and form approved and required by Anaconda, with Anaconda named "as additional insured" (R. 44–45). Anaconda provides, "without cost to Operator," housing accommodations for all of the Operator's employees (R. 43). Operator is prohibited from assigning or subletting, or granting any concessions on, the premises without the prior written consent of Anaconda (R. 44). And the agreement is terminable upon only 30 days written notice by either party (R. 41).

3. The assertion in petitioners' statement of the questions (Pet. 2) that the bunkhouse and messhall facilities are "also open to the public" is contradicted by the evidence as well as by the specific factual findings (as distinguished from general conclusions) of the trial court. It was stipulated as a fact, and the trial court found, that lodging at the bunkhouse "is limited to the male employees of Anaconda who are either single or whose families reside outside the Anaconda area" (Fdg. 5, Pet. App. 8; Stip. R. 19), and there is no evidence that the bunkhouse was otherwise used even for occasional outside visitors or guests. An average of 62 of Anaconda's employees reside at the bunkhouse (Fdg. 3, Pet. App. 7). While the trial court's findings refer to this figure as only 20 percent of the total persons employed by Anaconda (62 out of 236) (Fdg. 3, Pet. App. 7), it is pertinent to note that 100% of the *occupancy* of the lodging facilities (exclusive of the lodging furnished petitioners' employees at Anaconda's expense) is by Anaconda employees and that the 62 occupants represent about 50 percent of Anaconda's miners and underground workers (R. 140) who are indispensable to the mining operation and are generally transient or migratory workers. These are the workers for whom the bunkhouse facilities are peculiarly adapted, while most of the mill workers, whose work is of a more stable nature, live with their families in trailers or housing units on Anaconda property (most of which trailers and housing units are owned by Anaconda and rented to the employees) (Fdg. 3, Pet. App. 6).

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For all practical purposes, the messhall is also operated exclusively for Anaconda employees, principally for those who live at the bunkhouse (Fdg. 3, Pet. App. 7). The restricted sense in which the trial court used the term "open to be patronized by the public (guests and visitors and cash meals)" (Fdg. 5, Pet. App. 8) is evident from the express qualification "to the extent shown in Exhibit C" and from the further explanation in the finding itself. The so-called "members of the general public" who patronize the messhall are not only few in number and served just "occasionally and incidentally," but have consisted almost entirely of guests of Anaconda employees and occasional visitors in the area, such as members of historical or geographical organizations (Fdgs. 1, 5, Pet. App. 5, 8), and virtually all of such meals are paid for by Anaconda or Anaconda personnel, the "cash meals" (*i. e.*, those paid for by visitors themselves) averaging about eight a month out of a total of from 4,000 to 5,000 meals served per month (Exh. C, R. 49). That the messhall is not operated as a public eating establishment is further evidenced by a sign on one of the access roads warning "children and unauthorized persons" to "keep out" (Pltfs. Exh. 1, R. 86), and by the absence of any signs or other advertising indicating that it is an ordinary eating place (R. 85, Fdg. 5, Pet. App. 8). The messhall is operated principally for the employees residing at the bunkhouse who constitute the bulk of the persons regularly fed there, the other employees eating there only occasionally (Fdg. 3, Pet. App. 7). Mealtimes are

adjusted principally to accommodate the working shifts of these employees (Fdg. 3, Pet. App. 7–8) and box lunches for employees "working in the mine who cannot practically leave the working area" for lunch (Fdg. 15, Pet. App. 14), comprise a substantial proportion (from 20 to 25 percent) of the total meals prepared by the messhall (Exh. C, R. 49).

On the essentiality of the bunkhouse and messhall operation, one miner testified, "I couldn't possibly be an employee for Anaconda without the bunkhouse" (R. 91). Another testified that he utilized the subsistence facilities because there were no other available rooming houses or restaurants nearby (R. 94, 95). The one miner called as a witness by petitioners, after admitting that he did not know of any other available living facilities, stated when pressed "* * * I believe I might be able to set up a wigwam or teepee" (R. 112). The sole advertising of the facilities is in connection with Anaconda's help-wanted advertisements, which make a particular point of noting that "good bunkhouse accommodations" are available (Pltfs. Exh. AA, R. 51), admittedly as an inducement to workers needed for the mining enterprise (R. 128–130).

4. The trial court, although stating that "[t]here is no doubt" that employees engaged in an operation such as petitioners for a "mining company in an isolated area" would be covered by the Act (Pet. App. 1–2), concluded that there was no such "isolation" here and that the furnishing of such facilities had become progressively "less essential" and is now

only "a convenience" (Pet. App. 2–3). In its Findings of Fact (Pet. App. 4–22), the trial court, in addition to describing factually petitioners' operation and the facilities available in towns from 23 to 40 miles distant from the mine, also included its conclusory inference and opinion that the situation here was "different from one in which the activity is located in a remote and isolated area where competition is nonexistent," and that petitioners' facilities are "a convenience only" which, if "curtailed or abandoned entirely", would cause only temporary and unsubstantial inconvenience to the operation of the mine because "in all probability" competing facilities would expand to meet the needs of these mine workers (Pet. App. 18).

While in its oral opinion the trial court has stated that it also regarded the retail establishment exemption as applicable to petitioners' operation (Pet. App. 3), it made no findings or conclusions of law with respect to the claimed exemptions, and rested its judgment dismissing the complaint solely on its findings and conclusion that petitioners' operation was "not closely related or directly essential to production within the meaning of Section 3 (j) of the Act" (Pet. App. 22–23).

5. The Court of Appeals (Judge Fee dissenting) reversed on the grounds that "the evidence permits of no other conclusion than that Anaconda's furnishing of the facility was essential to its business," that "[r]ealistically, [petitioners] are managing the facility for Anaconda, and as a facility directly essential

for Anaconda's enterprise," and that "the undisputed facts" clearly brought this case within the principles of *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C. A. 9), and *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C. A. 8), which remained unchanged by the 1949 Amendments to the Act (Pet. App. 31, 32–33).[1]

ARGUMENT

The decision below is correct; it accords with this Court's decisions, and it is indistinguishable from rulings of two Courts of Appeals which were approved and reaffirmed by Congress at the time of the enactment of the 1949 Amendments to the Fair Labor Standard Act. There is no conflict with the decision of any other Court of Appeals, and the holding is limited to a factual situation which is not general or widespread, and does not affect the industrial feeding

[1] Because of the dissenting opinion, the court below gave unusually thorough and extended consideration and reconsideration to this case. Over two years elapsed between the filing of the appeal (March 18, 1954, R. 77) and the final order denying the petition for rehearing (July 30, 1956, Pet. App. 37). After the submission of the original briefs and the first oral argument (held February 18, 1955, R. 176), the case was under advisement for over six months before the original decision was handed down (on August 25, 1955, Pet. App. 26). Three and a half months later (December 14, 1955, R. 192), the court requested supplemental briefs on questions raised by the dissenting opinion and the petition for rehearing. Six months later (on June 25, 1956, R. 194), the case was orally reargued. Additional memoranda were filed after the reargument at the request of the court, and the petition for rehearing was finally denied on July 30, 1956 (Pet. App. 37), almost a year and a half after the case had been submitted on the original briefs and the first oral argument. The complaint in the district court was filed on January 23, 1953 (R. 7), so that the case has now been in litigation for over 3½ years.

industry generally. Accordingly, there is no occasion for review by this Court.

I

The court below was correct in holding that the *Kirschbaum, Womack* and *Lagerstrom* decisions (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C. A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C. A. 8)) are directly in point and controlling, and that *McLeod* v. *Threlkeld,* 319 U. S. 491, and the other cases on which petitioners rely, are inapposite.

1. The principles governing the "production of goods" phase of the Act's coverage are contained in *Kirschbaum,* not in *McLeod* which dealt with the "in commerce" phase of the Act's coverage. In *Kirschbaum,* the Court held that maintenance workers in a loft building tenanted by interstate producers "had such a close and immediate tie with the process of production for commerce" as to be "an essential part" of the production within the scope of Section 3 (j) of the Act which then (prior to the 1949 amendment) included "any process or occupation necessary to the production" (316 U. S. at 525–526). It also ruled that the renting of such a building and the furnishing of maintenance services was not within the scope of the "retail or service establishment" exemption because "selling space in a loft building is not the equivalent of selling services to consumers" (*Id.* at 526). These principles were repeatedly reaffirmed in subsequent decisions of this Court, notably in *Armour Co.*

v. *Wantock*, 323 U. S. 126, where it was emphasized that the occupation need not be "indispensable" to the production in order to be within the Act's coverage and that "what is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods" (*Id.* at 130); and in *Boutell* v. *Walling*, 327 U. S. 463, 467, where the Court reaffirmed the principle that the furnishing of services solely as an integral part of an interstate business, as distinguished from services to consumers generally, is not within the "retail or service establishment" exemption.

As the opinion below points out (Pet. App. 29–30), these were the principles applied by the two Courts of Appeals in the *Womack* and *Lagerstrom* cases, which held that the operation of cook houses in logging camps, under circumstances practically identical to the conditions in the instant case, was within the coverage of the Act and not exempt. There is no basis for any factual distinction. One of the cook houses in *Womack* was in a village providing more public eating facilities than are available in the town of Darwin in this case, and "it would have been possible for food to have reached the men so that some lumbering could have been done" (Pet. App. 29–30). Also in that case, as in the instant case, many of the employees did not use the facilities in issue. But the availability of other limited facilities was held "not persuasive" since "no such establishment could supply the necessary meals required by [such a large number of] hungry laborers" (132 F. 2d at 107). Similarly,

in *Lagerstrom* other facilities were available in towns located only 13 miles from the logging camp and there was a highway close by "open the year around, with many men owning cars of their own," and employees were not required to use the facilities and a number of them did not use them (133 F. 2d 120, 122).

2. While these decisions were rendered prior to the 1949 amendment to Section 3 (j), they were left unchanged by the amendment, as was made clear in the legislative reports on the 1949 changes.

(*a*) Specifically, that the amendment to Section 3 (j) was not intended to exclude from the Act employees of the type here involved was made clear (1) by rejection of the word "indispensable" as being too restrictive, (2) by the choice of language virtually identical to this Court's language in *Kirschbaum,* (3) by statements in both branches of Congress expressly approving the *Kirschbaum* case, and (4) by express approval of the *Womack* and *Lagerstrom* decisions in the Report of the Majority of the Senate Conferees.

In amending Section 3 (j) by substituting the language "closely related" and "directly essential" for the word "necessary," Congress explicitly rejected the more restrictive term "indispensable." As pointed out in the Report of the Majority of the Senate Conferees, the language of the amendment.

> * * * adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage. This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production

> which may reasonably be considered close as distinguished from remote and tenuous. Its reference to activities directly essential to production *does not, as did the House Bill, require that the activities be indispensable to production.* Rather, the conference agreement contemplates activities *which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods.* Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings [95 Cong. Rec. 14874, October 18, 1949; emphasis added].[2]

Then, referring to the specific situation involved in the instant case, and the *Womack* and *Lagerstrom* decisions, the Report states:

> * * * Of course, this does not mean that the language of the conference agreement withdraws from coverage employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production and the furnishing of such facilities is therefore closely related and directly essential to production, as in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C. A. 9); *Hanson* v.

[2] See also 95 Cong. Rec. 14936, October 18, 1949.

> *Lagerstrom,* 133 F. 2d 180 (C. A. 8); *Basik* v. *General Motors Corp.* (Mich. Sup. Ct.), 19 N. W. 2d 142 [*Ibid.*].

In an attempt to avoid the impact of this express approval of the *Womack* and *Lagerstrom* decisions, petitioners quote from the House Conference Report (Pet. 21–22). This Report does not mention these two decisions, but states:

> * * * Coverage of the act has also been extended to employees of an *independently owned and operated restaurant located in a factory* (*McComb* v. *Factory Stores,* 81 F. Supp. 403 (N. D. Ohio, 1948). Under the bill as agreed to in conference an employee will not be covered *unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc. activity* * * * [95 Cong. Rec. 14928, October 18, 1949; emphasis added].

These two statements obviously relate to two different situations, and there is no such inconsistency as petitioners imply.[3] The House Report had reference only to the typical situation of an independently owned and operated restaurant located in a factory, which is operated much like any neighboring restaurant to which the factory workers and the general public might have access. On the other hand, food and

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[3] Petitioners contend that the Court should ignore the Senate Conferees Report and should rely solely on the House Managers Report (Pet. 22, footnote). But the objection to the timeliness of the Senate Report cannot affect the undeniable fact that it represents the views of the majority of the Senate Conferees, who included the principal sponsors of the bill, and, therefore, is a significant part of the legislative history.

lodging facilities in an isolated mining or lumber camp, operated and controlled as an integral part of the production enterprise, obviously fall in the category having a "closer and more direct relationship to the producing * * * activity," within the terms of the House Report.

The facts in the *Factory Stores* case, cited in the House Report, point up the striking contrast between the two situations. The restaurant there was unquestionably "independently owned and operated," and part of a truly independent enterprise with the ordinary risks of an independent entrepeneur. It was hardly comparable to the "subsistence agreement" in the instant case under which petitioners are fully reimbursed by the producer for all costs and guaranteed a monthly "profit" in addition. See the Statement, *supra*, pp. 4–6. Moreover, there are obvious differences between a cafeteria in a factory located in the center of a city, and food and lodging facilities in an isolated mining or lumber camp. A cafeteria in a factory, for example, usually serves only one meal a day (lunch) and snacks, as compared with the mining employees' virtually complete dependence on the food and lodging facilities furnished through petitioners. This inaccessibility and dependence are significant factors in determining whether the furnishing of facilities has "a closer and more direct" relation to the production process.[4]

[4] Even if the Senate and House Reports were inconsistent on this point, the conflict should be resolved in favor of the specific "more clear-cut" statement in the Senate Report. See *Steiner* v. *Mitchell*, 350 U. S. 247, at 255.

In addition to approving specifically the *Womack* and *Lagerstrom* decisions, the Senate Report expressly approved, *inter alia,* this Court's decisions in *Kirschbaum* and in *Armour Co.* v. *Wartock, supra,* pp. 12–13, as "typical" of "tasks necessary to effective productive operations of the producers" and "closely related and directly essential to production, within the meaning of section 3 (j) as amended" (95 Cong. Rec. 14874–14875). The House Managers Report also specifically approved *Kirschbaum* as representative of "work that is closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14929). Moreover, the House Report stated that employees engaged in such tasks "will remain subject to the act, *notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce*" (Ibid., emphasis added). To the same effect, see the Senate Report, 95 Cong. Rec. 14875.

It is thus apparent, we submit, that the pre-1949 decisions on coverage directly in point here were left unchanged by the 1949 Amendments and are still controlling.

(*b*) It is equally evident that the 1949 Amendments left unchanged the pertinent decisions holding the "retail or service establishment" exemption inapplicable to this type of operation. In addition to the legislative history making it clear that there was no intent to affect *Kirschbaum,* it was emphatically and repeatedly stated, in both the House and Senate discussions, that the amendments to the retail exemption

were not intended to extend the exemption to establishments "which are not ordinarily available to the general consuming public," and this Court's decision in *Boutell* v. *Walling, supra,* p. 13, was specifically reaffirmed (95 Cong. Rec. 12505, 14877). Thus, the main sponsor of the amendments to this exemption, Senator Holland, in answer to the specific question whether the proposed amendment would change the *Boutell* decision, stated flatly "No * * * because such establishment *is not open to the general public* and is really the same as a repair department operated by the interstate motor carrier itself * * * [and] *is not like a garage patronized by auto and truck owners generally*" (95 Cong. Rec. 12505, emphasis added). That this same principle was intended to apply to similar adjuncts of interstate production plants is confirmed by the Report of the Majority of the Senate Conferees, where the same point was made in a more general context as follows:

> The conference agreement exempts establishments which are *traditionally* regarded as retail. *Establishments which are not ordinarily available to the general consuming public* (such as the motor-carrier repair affiliate considered in *Boutell* v. *Walling* (327 U. S. 463) * * * will *not become retail or service establishments* under the provisions of the conference agreement [95 Cong. Rec. 14877, emphasis added].

See also explanation of Mr. Lesinski, one of the managers on the part of the House, that "The conference agreement does not change the status, insofar as the

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retail or service exemption is concerned, of establishments which are not ordinarily available to the general consuming public" (95 Cong. Rec. 14942). [Emphasis added.]

In drafting the amendments to the Act, Congress was well aware that restaurants were generally exempt as retail establishments under Section 13 (a) (2). There would have been no occasion for legislative discussion regarding *coverage* (under Section 3 (j)) of industrial feeding facilities, or for the careful distinction between lumber camp cookhouses and independently operated factory restaurants (see *supra* pp. 15–16), if *all* such feeding establishments were exempt as retail restaurants. Plainly, employees engaged in integrated cookhouses of the *Womack* and *Lagerstrom* type were not regarded by Congress as working in exempt "restaurants" under Section 13 (a) (2).

3. The plain inapplicability of the retail or service establishment exemption disposes of petitioners' claim to exemption under Section 13 (a) (1) (Pet. 29–31). Employees engaged in the operation of the bunkhouse and messhall are obviously no more employed in a "local retailing" capacity under Section 13 (a) (1) than they are employed by a "retail or service establishment" under Section 13 (a) (2). This Court has expressly recognized that the exemptions in these two sections are merely complementary and intended to exempt only employees engaged in "local retailing" in the ordinary and traditional sense of serving the general consuming public. *Phillips Co.* v. *Walling,*

324 U. S. 490 at 497, *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 at 571.

4. Petitioners' reliance on *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Mancja* v. *Waialua Agricultural Co.*, 349 U. S. 254 (Pet. 10, 12) is clearly misplaced. As this Court itself made clear in *McLeod*, its decision there rested on the distinction between the "production of goods" phase of coverage and the "in commerce" phase of coverage (319 U. S. at 501). Far from modifying or overruling the *Womack* and *Lagerstrom* decisions, the Court specifically cited them, with apparent approval, along with *Kirschbaum*, as illustrating the contrast between the scope of coverage of the two phases (*Ibid.*, n. 17). The *Waialua* ruling is equally inapposite. Unlike the bunkhouse and messhall facilities here, that case involved the maintenance and performance of "the usual civic functions" for a village, operated as "an ordinary town" where "some of the employees," but also their families and many "others," lived (349 U. S. 254 at 271). The facilities were not exclusively or peculiarly adapted to the needs of production workers but were furnished, also, not only for their families but generally to the public in the community. As the Court of Appeals for the Ninth Circuit expressly noted in its *Waialua* opinion, the Department of Labor did not claim that the maintenance and operation of such generally available facilities were within the coverage of the Act (216 F. 2d 466 at 468), just as it does not here assert coverage of the rental of houses by Anaconda to employees and their families, even though such facilities, in a broad sense, might be neces-

sary to the production enterprise. The line of distinction is that the furnishing the bunkhouse and messhall facilities is directly essential and closely integrated with the production operation whereas in the other instance it may be only indirectly so. This is the very distinction Congress drew in enacting the 1949 Amendments.

II

The decision below is not in conflict with that of any other Court of Appeals. The Tenth Circuit's decision in *Juarez* v. *Kennecott Copper Corporation,* 225 F. 2d 100 (Pet. 14) is even more inapposite than this Court's *Waialua* ruling. It involved a semi-public hospital, caring for patients consisting of the general public as well as members of the mining community. Approximately 80 percent of its operations was devoted to serving the general public and only 20 percent to the mining employees (*id.* at 101, 103). In addition, the undisputed facts showed that there were ample facilities in the area to care for the employees without the maintenance of the hospital (*Ibid.*). Clearly, the facilities were not specially provided "as a means of assuring continued and efficient production" as in the instant case or in *Womack* and *Lagerstrom.*

Equally without merit is petitioners' assertion of a conflict with the Sixth Circuit's "decision" in *Factory Stores* v. *McComb,* 179 F. 2d 238. The Sixth Circuit handed down no decision in *Factory Stores;* it simply remanded the case "for further proceedings and consideration under the 1949 amendments of the Fair Labor Standards Act", and this on the Government's motion in which *Factory Stores* joined. The case,

moreover, is plainly distinguishable, as pointed out *supra,* p. 17.

Also, the decision below does not conflict with the district court decisions cited by petitioners (p. 17). Those all involved the type of *factory* restaurant or cafeteria, operated as a truly independent enterprise and with the other characteristics of the restaurant involved in the *Factory Stores* case (see *supra,* p. 17). The district court cases involving cookhouse facilities at lumber camps (which, it may be noted, were decided subsequent to the 1949 Amendments) are in accord with the decision below. *Tobin* v. *Cherry River Boom and Lumber Co.,* 102 F. Supp. 763 (S. D. W. Va.); *Tobin* v. *Promersberger,* 104 F. Supp. 314 (D. Minn.).

III

Contrary to petitioners' assertion (Pet. p. 8), the issues here presented do not affect the entire industrial feeding industry, but only the limited situation where the furnishing of facilities is directly essential to and integrated with the production operation because of the isolated circumstances and the actual unavailability of other adequate subsistence facilities—the situation which Congress, in enacting the 1949 Amendnments, expressly distinguished from the more common and the prevalent variety of independent industrial feeding enterprises (see *supra,* pp. 15–16). This type of operation is, for the most part, limited to isolated mining and logging camps, and is becoming less prevalent. Petitioners' own witness testified that this type of operation is becoming "less frequent,

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principally because of better roads, easier access, and the men's natural desire to live in larger communities where it is possible" (R. 125).[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Department of Labor.

OCTOBER 1956.

[5] Although this testimony was proffered as evidence that the facilities are non-essential, it showed rather that they are supplied only as long as they are essential to the production operation, and abandoned only when they become non-essential (R. 118–130).

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IN THE

Supreme Court of the United States

October Term, 1956

No. 460

HAROLD S. ANDERSON, JR., and ALFRED E. OHL, Individually and as Copartners, Doing Business as H. S. ANDERSON COMPANY,

Petitioners,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY OF PETITIONERS TO THE BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent's statement of the facts and the issues is at substantial variance with petitioners' understanding of them. Respondent's mistaken references to legislative and judicial statements and decisions are frequent. We therefore feel it necessary to make the following statement of clarification and correction so that the legal issues raised by the Petition may be presented in their accurate factual and legal context.

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1. The Issues in This Case Require the Consideration and Determination of This Court.

Important questions as to the scope of coverage of the Act and the extent of the exemptions contained therein are presented in this case. The entire industrial feeding industry is involved. We respectfully urge that this Court should review the majority decision below in view of the clear conflict with the decisions of this Court and of two circuits, and with the clear requirements of the Act particularly as shown by its legislative history.

The decision below is very broad in its scope. It states the basis of its decision as follows:

> "It is, of course, essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper." 235 F. 2d 638, 641. (Pet., Appx. 29.)

The decision specifically labels this as a "broad principle" as it quite clearly is. *It is, on its face, broad enough to encompass the entire industrial feeding industry.*

Furthermore, it appears obvious to us that under this principle, a different result would have been required in the *Maneja* case in this Court, and in the *Juarez* and *Factory Stores* cases in the Tenth and Sixth Circuits.*

**Maneja v. Waialua Agri. Co.* (1955), 349 U. S. 254;

Juarez v. Kennecott Copper Corp. (10th Cir., 1955), 225 F. 2d 100;

McComb v. Factory Stores Co. (N. D. Ohio, 1948), 81 F. Supp. 403, 2 remanded (6th Cir., 1949), 179 F. 2d 238.

DARK

The holding is also contrary to very clear Congressional intent.

Under these circumstances if the majority decision below is not reviewed, the industrial feeding industry will not know whether its employees are covered or not. There are in excess of 26,000 such enterprises in the United States. This clear conflict and resulting confusion can only be resolved by this Court.

In addition, the majority decision below disposes of the entire exemption question with the following statement:

> ". . . we are of the opinion that the evidence conclusively establishes, as we have concluded, that the facility is an integrated part of the Anaconda enterprise and that such conclusion is inconsistent with any conclusion that it is a retail enterprise." 235 F. 2d 638, 642. (Pet., Appx. 33.)

There is no consideration of the three criteria specified in Section 13(a)(2) of the Act to determine this question. This amounts to reading Section 13(a)(2) out of the Act as applied to this industry. *It in effect holds that if the activities of employees are covered, the company employing them cannot be a retail or service establishment.* It applies the same test to determine both questions although the tests established by the Act are *entirely different.* The impossibility of this result is shown by the fact that in one case—coverage—the test is the activity of the employee, whereas in the other—the Section 13 (a)(2) exemption—the test is the business of the employer.

Such a general disposition of this question leaves the significance of Section 13(a)(2) in a total state of confusion. Under the majority decision below, the section

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just does not mean what it says. Respondent has not helped this situation because he has studiously avoided any discussion of the specific requirements of that section.

Mitchell v. Bekins Van & Storage Company, October Term, 1956, No. 122, now pending in this Court, also involves the interpretation of Section 13(a)(2). The Ninth Circuit unanimously ruled against respondent's position as did the District Court. Respondent then filed a Petition for a Writ of Certiorari with this Court upon the ground that the importance of the interpretation of Section 13(a)(2) warranted the consideration of this Court and that if unreviewed, the decision would "cause great confusion and uncertainty, since there are many multi-unit businesses engaged in various processing and other non-retail functions not strictly analogous to the typical retail chain warehouse." (Pet. *Mitchell v. Bekins Van & Storage Company,* 19.)

The Petition was granted. We find difficulty in reconciling respondent's position there with its position here. In our opinion, the issues in this case are of greater importance and of more substantial effect than is true in the *Bekins* case. Important questions as to the requirements of the Act are raised under Sections 3(j) and 13(a)(1) in this case as well as under Section 13(a)(2) which is the only section involved in *Bekins.* The confusion and uncertainty which would result from the majority decision below, if unreviewed is, in our view, greater here.

Respondent urges that this Court should not review this case, that the decision is confined to "the limited situation where the furnishing of facilities is directly essential to and integrated with the production operation because of the isolated circumstances and the actual unavailability of other adequate subsistence facilities . . "

DARK

(Br. in Opp. 23.) The decision however is not so "limited." On the contrary the controlling principle is, and is stated to be, a broad one (235 F. 2d 638, 641, Pet. Appx. 30). But even if it were limited as respondent states, this situation would include the *Factory Stores* case which is a typical industrial feeding establishment. Even under respondent's minimizing test the industry is affected by the decision below.

Respondent has contended in this case that the purpose of this litigation is to have the courts determine the questions of coverage and exemption so that the Act could be more definitively administered. [R. 168-169.] It is, therefore, surprising to find respondent now resisting such a final determination, particularly in view of the divided court below and the conflict with the decisions of this Court, with decisions of other circuits, and with the clear requirements of the Act as shown in its legislative history.

2. The Statement of Facts.

Respondent's argument and the statements of fact upon which it is based run directly counter to the Findings of Fact. The Findings are based principally upon stipulated evidence; the remaining facts are established by substantial, uncontradicted evidence. They have not been significantly or successfully challenged and are, of course, the basis upon which this case must be decided.

For example, respondent argues that petitioners' facilities are part of closely integrated effort for the production of goods and that they are essential to the production operation. But the Findings specifically state:

> "In the event that the sales and services provided by defendants (petitioners) at their Darwin operation should be curtailed or abandoned entirely there would

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> be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof." [Finding 19, R. 68-69, Pet. Appx. 18.]

Again, respondent advances the contention that without petitioners' facilities, employees could not remain at the Darwin operation. (Br. in Opp. 9.) This too is contrary to the Findings of Fact which state specifically that:

> ". . . the presence or absence of defendant's type of facility would not be a deciding or important factor in the existence of a labor supply." [Finding 25, R. 73, Pet. Appx. 21.]

Respondent states that the Darwin operation is "in a remote and isolated area," referring to the "Mojave Desert" and "Death Valley." (Br. in Opp. 3.) But the Findings specifically state that:

> "Defendants' (petitioners') facilities are not remote and isolated to such an extent that it is removed from ordinary business competition. It is a situation different from one in which the activity is located in a remote and isolated area where competition is nonexistent." [Finding 20, R. 69, Pet. Appx. 18.]

The Darwin area is connected with surrounding communities over a two-lane, paved, high speed highway open all year. Fifty per cent of the employees who utilize petitioners' facilities own their own automobiles and

the remaining employees ride with them when there is need or occasion for transportation. [Findings 6, 7; R. 59, Pet. Appx. 9.] The school children of Anaconda employees and others in the area daily attend school in Lone Pine. [Finding 24, R. 72, Pet. Appx. 21.]

Facilities other than petitioners are not only available but are actually used by 75 to 80% of the employees of Anaconda. Only the remaining 20 to 25% utilize petitioner's facilities. [Finding 3, R. 55-56, Pet. Appx. 6-7.]

Respondent characterizes the facilities in the surrounding communities of Lone Pine, Olancha, Keeler, Panamint Springs and Darwin as "meager." (Br. in Opp. 4.) Actually abouty twenty-nine employees live in these neighboring communities and commute daily to the Darwin operation. [Finding 3, R. 55-56, Pet. Appx. 6-7.] This is about 50% of the total number of employees who utilize petitioners' facilities. This is perhaps the best and most obvious test of the availability of other facilities. Furthermore, it is a matter of common knowledge, as well as of record in this case, that the facilities in Lone Pine, a town of over 1,500, are ample. It contains several restaurants, motels, a hotel, boarding houses, and rooming houses available to persons employed by surrounding mining, chemical and ranch companies in the area as well as to the general public. [Finding 11, R. 62-63, Pet. Appx. 13.]

The Findings also establish, contrary to the argument of respondent, that petitioners' facilities are maintained as a convenience only; that mining and milling employees tend to prefer to live in communities even at the distances involved here because of the increased desire for community living, improved roads and better transportation; that numerous facilities are available elsewhere which are

similar in distance and type to those regularly used by employees in mining areas throughout the West; that at other mines, on several occasions, facilities similar to petitioners' under similar circumstances have been destroyed or discontinued without affecting production. [Findings 19-21, R. 68-70, Pet. Appx. 18-19.]

3. The So-called "Report of the Majority of Senate Conferees."

Respondent, in its Brief, repeatedly cites and heavily relies upon what it refers to as the "Report of the Majority of Senate Conferees" and on occasion misleadingly as the "Senate Report" and the "Senate Conferees Report." (Br. in Opp. 14, 15, 16, 17, 18, 19.)

We do not believe that this document assists respondent. However, it should be pointed out that the document referred to is not a "Report" at all. It is merely a statement of three senators submitted *after* the conference bill had been debated and adopted by the Senate. It was, therefore, not considered by the Senate or the House in their deliberations concerning the 1949 amendments. It is not part of the legislative history of the amendments. The only document before either the Senate or the House during the consideration of the amendments was the House Manager's Statement referred to by petitioners. (Pet. 21-22.)

In connection with the introduction into the record of the document which respondent characterizes as a "report", the following was stated:

> "Mr. Pepper [the author of the statement]:
>
> 'Let it be clearly understood that the statement only expresses the views of the named three Senators as to what is the meaning of the language adopted by the conference. . . .

* * * * * * * *

'. . . this is not intended to bind the Senate. . . .'" 95 Cong. Rec. 14870, 14783.

"Mr. Knowland:

'This is a statement which was brought in, obviously, after the Senate had already acted on the conference report; and therefore the statement could not in any degree have influenced the Senate in its decision on the conference report.'" 95 Cong. Rec. 14871-2.

"Mr. McFarland:

'. . . it is definitely clear that the statement is not adopted by the Senate as its interpretation.'" 95 Cong. Rec. 14871.

The document was specifically rejected as authoritative on the questions involved here:

"Mr. Taft:

'I do not believe that its treatment of the provision defining the term "produced" . . . and certain sections of the provisions defining the retail and service exemption constitute an accurate statement of the intent of the conferees or the legal effect of the words of the amendments.'" 95 Cong. Rec. 14872.

4. Maneja v. Waialua Agricultural Company (1955), 349 U. S. 254.

Respondent is entirely unsuccessful in attempting to distinguish this case. It is directly applicable and, we submit, contrary to the decision of the majority below. The employees in that case maintained housing facilities of a large farm enterprise "where the *great majority** of its

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*Emphasis ours unless otherwise indicated.

employees live". (*Id.* at 257.) Such housing was made available to the employees of the enterprise because lodging facilities elsewhere were *inadequate*. (*Id.* at 258.) Thus lodging facilities for the employees of the producer in commerce were inadequate and the producer acted to furnish them.

This Court determined that such employees, even though they were employed directly by the producer in commerce, were *not* covered by the Act. The Court stated that:

> "the work of the employees in maintaining the town clearly is not covered."

and that:

> "we do not believe that such a tenuous relation as here established is sufficient."
>
> *Maneja v. Waialua Agric. Co.*, 349 U. S. 254, 271, 272.

We urge that there is no significant distinction between that case and this. Under the principle established by the majority decision below, the employees involved in the *Maneja* case would have to be covered.

Again, this Court in *McLeod v. Threlkeld* (1943), 319 U. S. 491, stated:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."
>
> *McLeod v. Threlkeld*, 319 U. S. 491, 497.

5. McComb v. Factory Stores Co. (N. D. Ohio 1948), 81 F. Supp. 403, remanded (6th Cir. 1949) 179 F. 2d 239.

A review of the decision and history of this case can leave little doubt that Congress never intended to extend coverage to the category of business involved here. Respondent's effort wholly fails to avoid the controlling significance of this case. The facts are strikingly similar.

In the *Factory Stores* case, the eating facilities were not only located at the plants of the Republic Steel Company but were located adjacent to the places of work so that the employees could "eat whenever they get an opportunity, so that it does not interfere with the performance of their duties." (*Id.* at 405.) Most, if not all, of the employees utilized such facilities as distinguished from the 20-25% of the Anaconda employees who do so here.

It was specifically found that *"outside restaurants because of the lack of transportation facilities are too remote to be patronized"* (*Id.* at 409), and even if employees had the time they *"would find it very difficult if not impossible with the available transportation facilities"* to utilize outside restaurants. (*Id.* at 405.) Indeed, there was total "isolation" because Company regulations prohibited employees from leaving the plant. (*Id.* at 405.)

Respondent makes much of the limited use of petitioners' facilities by the public. In the *Factory Stores* case, the facilities were not open to the public at all. Aside from casual business patrons, *"the defendant caters solely to the 7,000 workers of Republic."* (*Id.* at 405.)

Respondent places much emphasis upon the contract between petitioner and Anaconda. But the contract between Factory Stores Co. and Republic Steel Company

was in all substantial respects the same type of contract as that involved here. (*Id.* at 401.) There was a somewhat different financial arrangement but we doubt that even respondent would desire coverage to depend upon the type of financial arrangement between a producer in commerce and an independent contractor.

Furthermore, contrary to the statements of respondent, petitioner is independently owned and operated. Indeed, petitioner, as was apparently true with the Factory Stores Co., operates similar facilities elsewhere for different companies. [Finding 1, R. 53, Pet. Appx. 4.) Nor do petitioners have a guaranteed "profit" as stated by respondent (Br. in Opp. 17), but only a guaranteed gross return which is quite different. Petitioner's are independent entrepreneurs to the same extent that the Factory Stores Co. was.

The trial court's decision in the *Factory Stores* case, rendered prior to the 1949 amendments to the Act, was substantially the same as the majority decision below [both on the coverage question and the retail service exemption question]. Following the passage of the amendments, the Sixth Circuit, where the case was then pending, remanded the case to the District Court specifically stating that it did so for consideration under the 1949 amendments. It was dismissed by the District Court.

We submit that there is no possible distinction between the *Factory Stores* case and the instant case. The case is in conflict with the majority decision below. If the Sixth Circuit had concurred in the conclusions and holding of the majority below, there would have been no purpose in remanding; the court would have had to affirm the trial court.

6. Juarez v. Kennecott Copper Corporation (10th Cir., 1955), 225 F. 2d 100.

This decision too is in direct conflict with the majority decision below. We urge that respondent's effort to distinguish it is futile. The Tenth Circuit itself rejects respondent's contention that there is a distinction when it says:

> "The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce."
>
> *Juarez v. Kennecott Copper Corp.*, 225 F. 2d 100, 102.

Recognizing the effect of the 1949 amendments and specifically referring to the legislative history concerning the *Factory Stores* case, the Tenth Circuit held the employees of a hospital located at the rim of an open-pit mine in New Mexico *not* to be covered by the Act.

7. The Section 13(a)(2) Exemption.

Respondent throughout this litigation has argued that petitioners' facilities, even assuming coverage, do not constitute a retail or service establishment within the meaning of Section 13(a)(2), because such a conclusion is inconsistent with the conclusion that the facilities are integrated with the production process. He has studiously avoided any consideration of the *three specific requirements* enumerated in Section 13(a)(2) itself which must determine this question.

The arguments of respondent on this issue are actually entirely irrelevant to the determination. If the three factors specified in Section 13(a)(2) are met, the

activity constitutes a retail or service establishment; if not, it does not.

In the instant case, the first two requirements have been stipulated. The last is established by substantial and uncontradicted evidence, indeed, including the same type of evidence relied upon by respondent in applying the same test under the same section in other cases.* We do not interpret respondent's silence concerning these criteria to even deny that they are met here.

The majority decision below did not even discuss the applicability of these criteria. *We submit that there can be no substantial doubt that under the tests established by Section 13(a)(2), petitioners facility constitutes a retail or service establishment.* Any consideration of the facts requires such a result.

8. The Section 13(a)(1) Exemption.

Respondent has also avoided a consideration of the specific requirements concerning the Section 13(a)(1) exemption for employees engaged in a local retailing capacity. Certain criteria involved in this determination were established by the Administrator of the Act himself. A consideration of the specific factors demonstrates that the employees involved are also exempt under this Section. (Pet. 29-31.)

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*See R. 148-154, Def. Exs. A-G; *Mitchell v. T. F. Taylor Fertilizer Works* (5th Cir., 1956), 233 F. 2d 284, and *Boisseau v. Mitchell* (5th Cir., 1955), 218 F. 2d 734.

Conclusion.

For the foregoing reasons and those stated in the Petition, we urge the Court to grant the Petition in this matter.

Respectfully submitted,

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Dated: November 6, 1956.